116-418

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 83.

JAMES J. O'REILLY AND JAMES W. KENNEDY, APPELLANTS,

vs.

JAMES W. CAMPBELL, FRED. T. BENSON, HERMAN LUCKIN, AND ELIZABETH DUDLER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 10, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the Supreme Court of Utah Territory.

Be it remembered that on the 21st day of December, 1881, there was filed in the office of the clerk of the supreme court of Utah Territory a transcript of the record and proceedings of the district court of the third judicial district of Utah Territory, in a certain cause entitled as follows:

JAMES W. CAMPBELL, FRED. T. BENSON, HERMAN LUCKON, and ELIZABETH DUDLER, Plaintiffs and Respondents,

vs.

JAMES J. O'REILLY and JAMES W. KENNEDY, Defendants and Appellants.

And that the following are true copies of record papers therein, to wit:

2 *Stipulation.*

In District Court, 3d Judicial District, Utah Territory.

JAMES W. CAMPBELL *et al.*, Pl'ffs, *vs.* J. J. O'REILLY *et al.*, Def'ts.

We hereby certify the following is a true copy of the pleadings, findings, judgment, & notice of appeal in this action, and the accompany- statement is the statement settled on motion for new trial & to be used on appeal from the judgment.

Nov. 14, 1881.

MARSHALL & ROYLE,
Pl'ffs' Att'ys.
SUTHERLAND & McBRIDE,
Def'ts' Att'ys.

3 *Complaint.*

In the Third District Court of Utah Territory, Salt Lake County.

JAMES W. CAMPBELL, FRED. T. BENSON, HERMAN LUCAN, & ELIZABETH DUDLER, Plaintiffs,

vs.

JAMES J. O'REILLY & JAMES W. KENNEDY, Defendants.

The plaintiff comp-ains and alleges: That on the 24th day of January, 1877, the plaintiffs as tenants in common were, ever since have been and now are, the owners (subject only to the paramount title of the United States), and in the possession and entitled to the possession of a certain mining claim situate in West Mountain mining district, Salt Lake county, Utah Territory, and recorded and known as the "Highland Boy" lode, bounded and described as follows, to wit: The same being in Carr Fork, Bingham Cañon, about two miles above the town of Bingham:

4 Beginning at the discovery stake and monument of said claim and running thence north 75° 30′ east 750 feet; thence south 16° 30′ west 100 feet to post No. 1; thence south 75° 30′ west 1,500 feet to post No. 2; thence north 16° 39′ west 200 feet to post No. 3; thence north 75° 30′ east 1,500 feet to post No. 4; thence 16°

30′ east 100 feet to the centre of east end line of said claim & lode, the point of beginning of surface boundaries, containing six and $\frac{88}{100}$ acres.

That the defendants, claiming to be the owners of an alleged mining claim called the "Omaha," and setting up and pretending that said alleged mining claim overlaps and embraces a part of said "Highland Boy" lode and mining claim, on or about the 12th day of February, 1877, procured to be made a survey and plat of said alleged Omaha mining claim preparatory to application for a United States Patent therefor, and caused to be included in said survey and plat as a part of said alleged Omaha mining claim all that part of the said "Highland Boy" lode and mining claim owned and
5 possessed by plaintiffs as aforesaid, which is bounded and described as follows: Commencing at post No. 2 of the official survey of said "Omaha" mining claim (lot No. 141), running thence south 35° 45′ east $16\frac{3}{10}$ feet; thence north 75° 30′ east $554\frac{1}{10}$ feet; thence north 54° 15′ east $554\frac{1}{10}$ feet; thence north 16° 30′ west $16\frac{3}{10}$ feet; thence south 75° 30′ west 560 feet; thence south 54° 15′ west 560 feet to place of beginning, containing $2\frac{56}{100}$ acres.

That on or about the first day of March, 1877, the said defendants filed said survey and plat, and also their application for a patent from the United States for said alleged "Omaha" mining claim, in the United States land office, in Salt Lake City, in the Territory of Utah, and in and by said application wrongfully represented and set forth that they were the owners and entitled to the possession of the last-above described premises as a part of said alleged "Omaha" mining claim and applied to either said lands and for a United States patent therefor.

That the said defendants continue to prosecute said appli-
6 cation & otherwise set up claim, & pretend that they own & are entitled to the possession of said premises.

That on the 28th day of April, 1877, these plaintiffs filed in said land office their protest and adv*i*-se claim to said application of defendants in due form, whereupon proceedings on said application were and are stayed in said office until the rights of possession of said last-described premises can be determined by a court of competent jurisdiction.

And the plaintiffs further allege that the aforesaid claim and all and every claim of said defendants to the ownership or right of possession of said last-described premises is wholly unfounded, and that if said defendant- be permitted to prosecute their said application and obtain a United States patent for said premises, the right, title, and right of possession of these plaintiffs will be clouded and encumbered to their great damage.

Wherefore plaintiffs pray for the judgment of this court
7 that they own and are entitled to the possession of said last-described land, and confirming and quieting their title and right of possession, and restraining the defendants from further prosecuting said application for a patent therefor, and for such other relief as may be equitable with cost of suit.

WOODS & GEE,
Att'ys for Plaintiffs.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

James W. Campbell, being duly sworn on his oath, says that he is one of the plaintiffs herein; that he knows the statements in the foregoing complaint, and they are true, of his own knowledge, except as therein stated upon information and belief, & as to those matters he believes them to be true.

JAMES W. CAMPBELL.

Subscribed & sworn to before me, May 25, 1877.

C. S. HILL, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

(Endorsed:) James W. Campbell *et al. vs.* James J. O'Reilley *et al.* Complaint. Filed May 25, 1877. C. S. Hill, clerk, by
8 H. G. McMillan, deputy clerk. Bennett & Harkness & Woods & Gee, pl'ffs' att'ys.

(Title of cause.)

Answer.

Now, come said defendants, and for answer herein deny that on the 24th (twenty-fourth) day of January, 1877, or at any other time, the plaintiffs, or either of them, as tenants in common or otherwise, were, or have been, or now are, the owners of or in the possession of the portion or tract of land set out in the complaint herein and embraced in the "Omaha" mining claim as surveyed, or any part or parcel thereof. Defendants deny that plaintiffs, or either of them, on the twenty-fourth (24) day — January, 1877, or at any other time, were the owners of in any manner or in the possession of any part, portion, or parcel of the land or premises set out in the complaint herein and last described therein, or any part thereof. But defendants allege that the said described premises are em-
9 braced in the application of these defendants for a patent for the Omaha mining claim and form a part of said Omaha mining claim, and the same is the sole property of and in the possession of these defendants.

Defendants deny that they, or either of them, ever at any time caused to be included in any survey or plat of the Omaha mining claim any part or portion of the "Highland Boy Lode" or claim, but allege that all the ground and land and vein so surveyed and platted by defendants in the application for a patent for the Omaha mining claim belongs to and forms a part of the Omaha mining claim, and is no part of or parcel of the pretended Highland Boy claim.

Defendants deny that they ever, at any time whatever, in any application for a patent for the Omaha mining claim, or any part thereof, or in any survey or plat thereof more fully represented or set forth, that they were the owners or entitled to the possession of the premises last described in the complaint herein, or any part thereof, as a part of the Omaha mining claim or otherwise.

Defendants deny that their claim to said premises, or any part thereof, or any claim of defendants thereto, or their claim to the
10 ownership, or right of possession thereof or of any part thereof, is wholly or in any manner unfounded. Defendants deny that by any act or acts of these defendants in their application for a patent or otherwise in or to said premises or any part thereof, the right or title, or right of possession of the plaintiffs, or either of them, to said premises or any part thereof, will be clouded or incumbered in any manner, to the plaintiffs great damage or otherwise.

And further answering herein defendants allege and show to the court that on or about the 24th day of June, 1870, the ground and premises hereinafter mentioned and described were a portion of the public vacant and unoccupied mineral lands of the United States, and contained therein a vein or lode of silver-bearing rock in place; that on said day R. H. Williams, M. Williams, John T. Thomas, G. Brown, William Angel, George R. Smith, and Wakefield Fenton, who were then and there all citizens of the United States, entered thereon and discovered said vein or load, and then and there duly located the same as a mining claim, and erected thereon a
11 monument and placed thereon a written notice of location thereof, and caused such notice to be duly recorded in the records of the mining district, within which said mine was and is situated, to wit: The West Mountain mining district, Salt Lake county, Utah Territory. In said notice said claim was called and is yet known as the Omaha Mine or Lode. A copy of said notice of location is hereto attached, and, together with the endorsement thereon, is made a part of this answer, and for that purpose is marked Exhibit "A," same as Exhibit "G" which see; that within the time required by the laws of said district and the laws of Congress, said locators and their grantors performed all the required labor on said mine, and defendants and their grantors and predecessors have from said date continuously held, owned, and possessed and worked said premises in strict accordance with all the mining laws, both local and national; that by divers mesne conveyances and proceedings duly signed, executed, acknowledged, delivered, and recorded, these defendants have become and are now the owners of and in the possession of the said Omaha mining claim as here-
12 inafter described, and being so the owners of the same did on or about the 1st day of March, 1877, after due survey, plat and proper proceedings therein file their application for a patent from the Government of the United States for the said Omaha mining claim described as follows, to wit: Beginning at post number (1) one of claim, running thence north 38 degrees 30 minutes, along the westerly end line of said claim two hundred (200) feet to post No. 2; thence north 51° 30′ east two thousand feet to post No. three (3); thence south 38° 30′ east two hundred (200) feet, along the easterly end line of said claim; thence south 51° 30′ west two thousand feet to post No. 1, the place of beginning, and containing an area of $9\frac{18}{100}$ acres. The said plaintiff- claiming under a pretended location, called the Highland Boy claim, which was located long subsequent to the location of the Omaha mining claim, filed

in the United States land office at Salt Lake City, Utah Territory, their adverse claim to said application for a patent, and filed a map therewith showing the conflict between the said applications
13 for the Omaha mine, a copy of which map is hereto attached, marked Exhibit "B," and made a part of this answer; that the area claimed by said conflict is the last-described tract set out in the complaint herein; that defendants are the owner- of, and in the possession of all said Omaha mining claim, including the ground in conflict, and are entitled to pre-empt the same and procure a patent therefor from the Government of the U. S.; that the pretended claim of ownership on the part of the plaintiffs to said portion of the Omaha mining claim is without right or title, and is a cloud upon defendants' title thereto: Wherefore defendants pray judgment of this court that plaintiffs' action be dismissed, and defendants be declared the owners of and in possession and entitled to the possession of the ground and vein so in conflict, and their title be declared free from any claim or ownership on the part of plaintiffs, or either of them, and for costs suit.

TELFORD & HAGAN,
Att'ys for Def'ts.

14 TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

J. J. O'Reilly, being first duly sworn, deposes and says that he is one of the defendants in the foregoing cause; that he has read the foregoing answer, and that the same is true of his own knowledge, except as to those matters stated therein on information and belief, and as to them, he believes it to be true.

J. J. O'REILLY.

Subscribed and sworn to before me, this 8th day of August, A. D. 1877.

[SEAL.] JOHN D. WHITE,
Notary Public.

EXHIBIT A.

Omaha Lode.

We, the undersigned, claim two thousand feet of this lode, with with all its dips, spurs, and angles, commencing at this shaft and running along *along* the lode one thousand feet in an easterly direction and one thousand in a westerly direction therefrom; this lode to be known as the Omaha lode.

R. H. Williams,	400	feet.
M. Williams,	200	"
15 John T. Thomas,	200	"
G. Brown,	200	"
Wm. Angel,	200	"
A. F. Tilden,	200	"
J. R. Taylor,	200	"
George R. Smith,	200	"
Wakefield Fenton,	200	"

Bingham Canon, West Mountain Mining District. Filed June 24th. Recorded June 24th, A. D. 1870.

J. N. MERRITT,
Dep. Recorder.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

I, Henry Thompson, recorder of West Mining District, hereby certify that the above is a full, true, and correct copy of the original notice of location of the Omaha lode, as recorded in book D of locations on page 214, records of West Mountain Mining District in said county and Territory.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Bingham City, this 7th day of February, A. D. 1877.

HENRY THOMPSON,
Recorder of West Mountain Mining District.

16 (Endorsed:) Third dist. court, Territory of Utah. James W. Campbell *et al. vs.* Jas. J. O'Reilly *et al.* Answer. Filed this 9th day of August, A. D. 1877. C. S. Hill, clerk, by H. G. McMillan, deputy clerk. Service accepted this 9th day of August, A. D. 1877. Woods & Gee, att'ys for pl'ff.

(Title of Cause.)

Findings of Facts.

From the pleadings — stipulations on file & the evidence submitted in the above-entitled cause, the court makes the following findings of facts, viz:

1st.

That the Omaha mining claim was discovered by M. R. Williams in 1870; that the prospecting for the vein or lode was done by him from a point marked in Plaintiff's Exhibit "G" as the "Pine Tree," near an old claim marked on said exhibit as "Rebel Soldier," and from thence east down to a point marked on said exhibit as Omaha Discovery.

17 2.

That the notice of location of said "Omaha, claiming 2,400 feet of this vein or lode," running easterly & westerly from this point, was posted on said claim by one Angel, in 1870, at or near a point marked on said exhibt as Alder Brush.

3d.

That said claim was not marked on the ground until the year 1877, long subsequent to the location and marking of plaintiff's claim; that the location notice referred to no natural or artificial [or surface] monument or boundary.

4th.

That all the title of the location of the Omaha acquired by said location has become by "mesne" conveyances fully vested in the defendants.

5.

That the discovery and location of said Omaha mining claim supposed that the vein or lode ran east and west, and so located it, & after such location and the recording thereof, so claimed it. That the locators thereof and their grantors made no claim to a con-
18 trary course until the year 1877, when the Omaha mining claim was surveyed for a United States patent, when it was claimed to run northeast and southwest, as shown on Defendants' Exhibit 2. [That the vein or lode which is claimed as the Omaha did not show itself on the surface, and its actual course had not been ascertained in 1874, and subsequent developments have demonstrated that it runs northeast and southwest.]

6.

That defendants and their grantors have complied with all the laws of the district and of the United States as regards work to entitle them to the said mining claim as originally located, worked, and claimed by the locators thereof.

7th.

That in 1873 the plaintiffs or their grantors discovered a vein or lode of mineral, in public, unoccupied land of the United States, at a point marked in Pl'ffs' Exhibit "G" as Highland Boy Discovery, and in said year 1873, made an ineffectual attempt to locate said
19 vein or lode, calling and designating it the "Highland Boy," as described in their complaint; and said location was perfected, made good, and marked out on the surface in 1874, a full and proper record thereof being then made.

8th.

That the plaintiffs and their predecessors in interest have been continually in the possession of said Highland Boy mining claim, embracing the ground in conflict herein since the location thereof in 1873, and was in such possession at the institution of this suit, and have continually worked and developed said mining claim, expending in labor and money thereon some six or eight thousand dollars.

9th.

That the vein or lode upon which said Highland Boy location is made runs northeast and southwest, substantially conforming with its survey as marked out on said Exhibit "G."

10th.

That the said plaintiffs or their predecessors in interest have in

all things complied with all the law in that regard, both of
20 the said United States and of said mining district.

11th.

That the Omaha location, as originally located and claimed by the locators thereof, covered, of the premises in conflict herein, only a small triangular part thereof, as shown in said Exhibit "G," and described more fully as follows, to wit, Beginning at post No. 4 at the northeast corner of the Highland Boy mining claim, from which United States mineral monument No. 5 bears south 3° 01′, west 2,567 feet, and running thence south 16° 30′ east, variation 17° 03′ east, along the easterly end line of the Highland Boy 75.8 feet to a point; thence west 266.8 feet to a point; thence north 73° 31′ east, along the northerly side line of the Highland Boy mining claim 256 feet to the place of beginning, containing an area of $\frac{222}{1000}$ of an acre.

12th.

That all the title of the original locators of the Highland Boy location to the said mining — has, by certain "mesne" con-
21 veyances, become fully vested in the plaintiffs herein.

Conclusions of Law.

And as a conclusion of law, from the foregoing finding of facts, the court finds that [at] the date of the commencement of this suit the plaintiffs were, and that they now are, the owner- of, in the possession of, and entitled to the possession of all the mining ground in conflict herein and fully set forth in said complaint, save and except only so much thereof as is embraced in said triangular piece of ground set forth and described by metes and bounds in said findings of fact, and said plaintiffs are entitled to a decree quieting their title to all of said premises in conflict, except that part thereof described by metes and bounds as aforesaid; and that said defendants, and each of them, their agents, attorneys, and servants, should be perpetually enjoined from further prosecuting their application for a patent for that portion of said premises in conflict which
22 said plaintiffs own, as aforesaid.

PHILIP H. EMERSON, *Judge.*

Title of cause.

Amendments to findings filed and additional finings requested.

1.

Amend first finding of fact by striking out the name of M. R. Williams in second line and the last seven lines, and insert in the second line after the word "discovered" the word located.

2.

Amend second finding of fact by striking out the word "said" at the end of the sixth line and insert the word plaintiffs, and insert af- the word exhibit the letter "G."

3.

Add to the third finding the words "except as aforesaid."

4.

Amend the fifth finding by striking from the fourth and
23 fifth line the words "and so located it," and all the remainder following of said finding, and insert in place thereof these words: And in their notice of location described it as running easterly and westerly, and that the vein discovered and located in said mining claim did not show itself on the surface and its actual course had not been ascertained in the year 1874; up to that time and later all the workings on the same were open to the observation of prospectors; there was no communication between the owners of said Omaha and the Highland Boy, as to the direction or course of said Omaha, until the survey thereof for patent thereof in the year 1877; the vein on which said Omaha was located has been found to run in a direction from the discovery point thereof northeast and southwest; that the defendants and their predecessors in interest have had and held continuous possession of said Omaha claim since 1870 by annual work done at the points laid down on Defendants' Exhibit 2 and identified as defendants' works.

24 5.

Amend the seventh finding by striking out of the third and fourth lines these words "on public unoccupied lands of the United States;" strike out all after Highland Boy Discovery in sixth line and insert as follows: "But they did not mark the same on the ground nor record a notice containing a description thereof, until the month of June, 1874, when they did both, and the vein so discovered, and on which said Highland Boy mining claim was so located, is the same vein on which said Omaha has been and was located as aforesaid.

6.

Amend the eighth finding by striking out the words "first location thereof in 1873," and insert in place thereof the words "by annual work done at the places marked to designate work on plaintiffs' Exhibit G."

7.

Amend the seventh finding by striking out lines one, two, and
25 part of three, to and including the word "covered," and insert in place thereof as follows: "Omaha claim, surveyed due east and west, would cover.

Said judge disposed of said amendments as follows:

[The above amendments are refused, except as indicated on the original findings, that is, by inserting in the next to the last line of the 5th finding, between the words "artificial" and "monument," the words "or surface," and by adding the six lines I have pinned to the original findings, to be added at the bottom of the findings (added in brackets.)

The plaintiffs except to the amendments made and the defendants except to refusals to amend as they request.

P. H. EMERSON, *Jud-e.*]

Title of Cause.

Decree.

This cause having been regularly tried by the court, the said parties appearing by their respective attorneys in the conduct of said trial, and the fact and conclusions of law in writing upon the issues in said action having been duly made and rendered by the court and duly filed in this action, on motion of the attorneys for said plaintiffs, and it is now therefore hereby ordered, adjudged, and decreed that the said plaintiffs have judgment
26 as prayed for in the complaint herein against said defendants and each and all of them; that at the date of the trying of said suit said plaintiffs were, and since that date has been and now are, in the possession, entitled to the possession, and, except as against the Government of the United States, the owners of, said property set forth in said complaint & hereinafter bounded and described; that all adverse claim of the said defendants, and each of them, and all persons claiming or to claim said premises, or any part thereof, through or under said defendants, or either of them, to said premises are hereby adjudged and decreed to be invalid and groundless; that the plaintiffs be, and they are hereby, declared and adjudged to be as aforesaid the true and lawful owners of said premises, and every part and parcel thereof; that their title thereto is adjudged to be quieted against all claims, demands, or pretentions of said defendants, or either of them, and that said defendants and
27 each of them are hereby perpetually enjoined from further prosecuting the said application for a patent for said premises. Said premises are situated in Carr Fork, Bingham cañon, West Mountain Mining District, Salt Lake county, Utah Territory, and includes all said premises in controversy in this action, which are bounded and described as follows, to wit, commencing at post No. 2 of the official survey of said Omaha mining claim (lot 141), running thence south 35° 45′ east $16\frac{3}{10}$ feet; thence north 73° 30′ east $554\frac{1}{10}$ feet; thence north 54° 15′ east $554\frac{1}{10}$ feet; thence north 16° 30′ west $16\frac{3}{10}$ feet; thence south 73° 30′ west 560 feet; thence south 54° 15′ west 560 feet, to the place of beginning; containing $2\frac{76}{100}$ acres; excepting therefrom so much thereof lying on the extreme northeast end thereof as is contained within the following boundaries and description, to wit: Beginning at post No. 4 at the north corner of the Highland Boy mining claim, from which United
28 States mineral monument No. 5 bears south 30° 1′ west, distant 2,567 feet, and running thence south 16° 30′ east, variation 17° 00′ east, along the easterly end line of the said Highland Boy claim, $75\frac{8}{10}$ feet to a point thence west $266\frac{8}{10}$ feet to a point thence north 73° 30′ east along the northerly side line of said Highland Boy mining claim 256 feet to the place of beginning, containing an area of $\frac{222}{1000}$ of an acre.

And it is hereby further, ordered, adjudged, and decreed that the plaintiffs do have and recover their cost in this action, hereby taxed at $211\frac{60}{100}$, against said defendants.

This the 14th day of May, A. D. 1881.

PHILIP H. EMERSON,
Judge of said Court.

(Endorsed:) 3035. James W. Campbell & others *vs.* James J. O'Reilly & James W. Kennedy. Decree. Filed May 14th, 1881. O. J. Aventt, clerk, by H. G. McMillan, deputy clerk.

(Title of cause.)

Order overruling Motion for New Trial.

29 The motion of defendants for a new trial herein having been submitted to the court upon the agreed statement herein and *pro forma*, it is ordered by the court that the said motion for a new trial be, and the same is hereby, overruled and decreed, and the court gives as its reasons therefor that the errors alleged by said defendants for a new trial did not occur *all* alleged, and no sufficient ground appears for a new trial; to which ruling and order defendants duly excepted.

Specifications of Errors.

I. Insufficiency of evidence to justify the decision and findings of the court:

1. The evidence is insufficient to justify that part of finding No. 5 which is in these words: "And so located it, and after such location and the recording thereof so claimed it; that the locators thereof and their grantees made no claim to a contrary course until the year 1877, when the Omaha mining claim was surveyed for a United States patent."

30 2. The evidence is insufficient to justify either of those parts of the 7th finding, which are in the following words: "That in 1873 the plaintiffs, or their grantors, discovered a vein or lode of mineral on the public unoccupied land of the United States at a point marked on the plaintiffs' Exhibit G as Highland Boy discovery;" and also "and said location was perfected, made good, and marked out on the surface in 1874, a full and proper record thereof being then made."

3. The evidence is insufficient to justify that part of the 8th finding which is in the following words: "That the plaintiffs and their predecessors in interest have been continuously in the possession of said Highland Boy mining claim, embracing the ground in conflict, since the first location thereof in 1873, and were in such possession at the institution of this suit."

4. The evidence is insufficient to justify the finding and decision of said court that the Omaha and Highland Boy are not on the same vein.

5. The evidence is insufficient to justify the 11th finding:

II. The findings and decision of the court are against law.

1. The court erred in embracing a legal conclusion in
31 the 5th finding of facts in these words, "And so located it;" and in embracing a legal conclusion in the 7th finding of facts in these words, "And said location was perfected, made good * * * in 1874;" and in that part of said 7th finding in which it is declared that the vein in the Highland Boy was discovered in public unoccupied land of the United States.

2. The conclusion- of law in the last preceding specification of error are not, nor is either of them, supported by any finding of fact.

3. The court erred in giving any effect to the finding that the plaintiffs or their grantors made a discovery of a vein or lode in the Highland Boy and located the — by the proceedings and at the place mentioned in the 7th finding of fact.

4. The court erred in the conclusion of law that at the commencement of the suit and at the time of the decision the plaintiffs were the owners and entitled to the possession of all the mining ground in conflict, less the part therein excepted. The said ground was embraced in the prior location of the Omaha and was never recorded, regularly located, by either plaintiffs or their grantors; recorded notice was never posted.

32 5. The court erred in refusing to amend the findings in the particulars or in any of the particulars mentioned in the amendments proposed by the defendants.

6. The court erred in its conclusion of law that said plaintiffs were entitled to a decree granting their title to all the premises in conflict less the exception therein stated.

III.

Errors in Law Occurring on the Trial and Excepted to by the Defendants.

1. The court erred in admitting in evidence the notice of location of the Highland Boy mining claim, recorded in 1873, Exhibit B.

2. The court erred in admitting in evidence the record of the addition made in 1874 to the location notice of the Highland Boy mining claim, and made part of said Exhibit B.

SUTHERLAND & McBRIDE,
Def'ts' Att'ys.

We have settled the foregoing statement on motion for new trial, and certify that the same is correct, and we also stipulate that it may be used in case of appeal from the judgment as statement on appeal.

Dated Oct. 4, 1881.

MARSHALL & ROYLE,
Att'ys for Pl'ffs.

SUTHERLAND & McBRIDE,
Def'ts' Att'ys.

The Exhibits G & 2 and H may be added to statement or used thus with or without being annexed.

SUTHERLAND & McBRIDE,
Def'ts' Att'ys.

33 MARSHALL & ROYLE,
Att'ys for Pl'ffs.

(Endorsed:) Filed Dec. 21, 1881. E. T. Sprague, clerk of supreme court.

34 *Stipulation.*

District Court, 3d Jud'l District of Utah Territory.

JAMES W. CAMPBELL *et al. vs.* J. J. O'REILLY *et al.*

It is stipulated by & between the respective parties to this action that the pl'ffs and def'ts named herein waive the production of proof of transfers of title from the original locators of the respective locations, in which they claim and agree that whatever title exists, derivable from the location under which each party claims, has been duly transferred to the pl'ffs and def'ts, respectively.

These admissions for the purposes of this trial only, and are made to save the necessity of the production of formal proof of conveyances.

Dec. 1st, 1880.

BENNETT & HARKNESS & WOODS,
Att'ys for Pl'ff.
SUTHERLAND & McBRIDE, *Def'ts' Att'ys.*

35 Afterwards at a term of the supreme court of Utah Territory, begun and held at Salt Lake City, Utah Territory on the sixth day of June, 1882, the following proceedings were had in said cause, to wit:

36 From 3d Dist.

FRIDAY, *June 9th*, A. D. 1882.

JAMES W. CAMPBELL *et al.*, Respondents,
vs.
JAMES J. O'REILLY, *et al.*, Appellants.

This cause, coming on regularly for hearing, was argued by Mr. McBride for appellants and Messrs. Marshall and Royle for respondents, submitted and taken under advisement.

THURSDAY, *June 15th*, A. D. 1882.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment.

Present and presiding: The Hon. John A. Hunter, chief justice; the Hon. Philip H. Emerson, associated justice, and the Hon. Stephen P. Teviss, associated justice. Present also the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

36½ From 3d Dist.

JAMES W. CAMPBELL *et al.*, Respondents,
vs.
JAMES J. O'REILLY *et al.*, Appellants.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereupon, it is now here ordered and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed; and further, that respondents have and recover of and from appellants the sum of ——— dollars, costs herein.

THURSDAY, *July 13th*, A. D. 1882.

* * * * * * *

From 3d Dist.

JAMES W. CAMPBELL *et al.*, Respondents,
vs.
JAMES J. O'REILLY *et al.*, Appellants.

In this cause appellants, by their counsel, Sutherland and McBride, pray the allowance of an appeal from the judgement of this
37 court heretofore entered to the Supreme Court of the United States, and thereupon such appeal is allowed, and the amount of the bond to be thereon given is fixed at the sum of $300.00.

38 The Supreme Court of Utah Territory. June Term, 1882.

JAMES W. CAMPBELL, FRED. T. BENSON, HERMAN LUCKEN, and ELIZABETH DUDLER, Plaintiffs and Respondents,
vs.
JAMES J. O'REILLY and JAMES W. KENNEDY, Defendants and Appellants.

Now on this day come the above-named defendants and appellants, and complain that error has been committed in the judgment and decree of this court herein entered against them to their prejudice, and pray the court to allow an appeal therefrom to the Supreme Court of the United States, that the same may be there reviewed and said error corrected.

SUTHERLAND & McBRIDE,
Att'ys for said Appellants.

Endorsed: Supreme court of Utah Territory, June term, 1882. J. J. O'Reilly *et al.*, appellants, *vs.* J. W. Campbell *et al.*, respondents. Prayer for appeal to the Supreme Court of the United States. Filed 13th July, 1882. E. T. Sprague, clerk.

39 *Bond on Appeal.*

Supreme Court of the United States.

JAMES J. O'REILLY and JAMES W. KENNEDY, Appellants,
vs.
JAMES W. CAMPBELL, FRED. J. BENSON, HERMAN LUCKIN, and ELIZABETH DUDLER, Appellees.

Know all men by these presents that we, Ed. H. Murphy and S. Ewing, are held and firmly bound unto the above-named James W. Campbell, Fred. T. Benson, Herman Luckin, and Elizabeth Dudler in the sum of three hundred to be paid the said parties, their executors or administrators; for which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this the 13th day of July, 1882.

Whereas the above-named James J. O'Reilly and James W. Kennedy have taken their appeal to the Supreme Court of the United States
40 from the judgment and decree heretofore herein entered against them in the supreme court of said Utah Territory, and said appeal has been duly allowed by said court:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute their said appeal to effect, and answer all costs if costs be adjudged against them therein, if they fail to make good their appeal, then this obligation to be void; otherwise, to be and remain in full force and virtue.

ED. H. MURPHY. [SEAL.]
S. C. EWING. [SEAL.]

Sealed and delivered in presence of—
JNO. R. McBRIDE.

I certify that the foregoing bond is good and sufficient.
JOHN A. HUNTER,
Chief Justice of Utah Territory Supreme Court.

Endorsed: U. S. Supreme Court. Bond on appeal. Jas. J. O'Reilly *et al.*, appellants, *vs.* Jas. W. Campbell *et al.*, appellees. Filed July 14th, 1882. E. T. Sprague, clerk.

41 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

JAMES J. O'REILLY and JAMES W. KENNEDY, Appellants,
vs.
JAMES W. CAMPBELL, FRED. L. BENSON, HERMAN LUCKEN, and ELIZABETH DUDLER, Appellees.

The United States to the above-named appellees, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington city, on the second Monday of October next, pursuant to an appeal

taken by the appellants herein, and allowed by the Supreme
42 court of the Territory of Utah, on the 13th day of July, 1882, in that certain suit therein, in which James J. O'Reilly and James W. Kennedy are appellants and defendants, and you, the said James W. Campbell, Fred. L. Benson, Herman Lucken, and Elizabeth Dudler are plaintiffs and respondents, and show cause, if any there be, why the judgment and decree rendered against said appellants should not be reversed and the error alleged corrected; and why speedy justice should not be done to the parties in that behalf.

In witness whereof, I, John A. Hunter, chief justice of the supreme court of Utah Territory, have hereunto set my hand, this 14th day of July, 1882.

JOHN A. HUNTER,
Chief Justice of Supreme Court of Utah Territory.

43 Attest: E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

[Seal Supreme Court, Territory of Utah, United States of America.]

44 [Endorsed:] Supreme Court of the United States. James J. O'Reilly *et al*, appellants, *vs.* James W. Campbell *et al*, appellees. Citation to appellees. Service of copy of the within citation is hereby acknowledged this 14th day of July, 1882. Marshall & Royle. Filed July 14, 1882. E. T. Sprague, clerk.

(Here follows 2 diagrams, marked pp. 45 & 46.)

47 TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of the appeal in the attached citation mentioned, herewith return to the Supreme Court of the United States said citation, with proof of service endorsed, and a transcript from the record of parts thereof, and of the entire proceedings of said supreme court of Utah Territory, with prayer for allowance of appeal and bond on appeal, all in and of the cause in said citation entitled; and I hereby certify that said transcript is a full, true, and correct copy of the several originals thereof on file or of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said supreme court of Utah Territory, at Salt Lake City, this 26th day of September, A. D. 1882.

[Seal Supreme Court. Territory of Utah. United States of America.]

E. T. SPRAGUE, *Clerk.*

Endorsed on cover: Utah Territory. Sup. court. No. 83. James J. O'Reilly and James W. Kennedy, appellants, *vs.* James W. Campbell, Fred. T. Benson, Herman Luckin, and Elizabeth Dudler. Filed 10th October, 1882.

116 U.S. 418

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1885.

No. 83.

JAMES J. O'REILLY and JAMES W. KENNEDY,
Appellants,

vs.

JAMES W. CAMPBELL, FRED T. BENSON, HERMAN LUCKEN and ELIZABETH DUDLER,
Respondents.

On Appeal from the Supreme Court of Utah Territory.

STATEMENT OF THE CASE, ASSIGNMENT OF ERRORS AND BRIEF OF APPELLANTS.

By J. G. SUTHERLAND and
JOHN R. McBRIDE,
Attorneys for Appellants.

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1885.

No. 83.

JAMES J. O'REILLY and JAMES W. KENNEDY,
Appellants,

vs.

JAMES W. CAMPBELL, FRED T. BENSON, HERMAN LUCKEN and ELIZABETH DUDLER,
Respondents.

On Appeal from the Supreme Court of Utah Territory.

STATEMENT OF THE CASE.

On the 24th of June, 1870, William Angel posted a notice of a mining claim called by him and his co-locators, the "Omaha Mining Claim," on a parcel of land containing a lode of mineral, lying in West Mountain Mining District, Salt Lake County, Utah Territory. There were nine persons named in the

of and are in posession and entitled to the posession of all the ground in controversy.

The answer then sets up the original location of the "Omaha" claim in 1870, making a copy of the original notice part of the pleading, avers compliance with all the laws of Congress and the local mining laws, the transmission of the title by conveyance to the present claimants, and asserts that they are now the owners of the same. They further allege the prior location of the Omaha claim, the survey for patent (a copy of the diagram of which is attached to the record), and pray judgment that they be deemed entitled to the premises in dispute. On the issues thus made the cause was tried and decree entered for the plaintiffs as before stated.

On the findings of fact and conclusions of law as returned in this record we assign the following

ERRORS:

FIRST.

The judgment is erroneous because the pretended findings of fact and conclusions of law do not comply, either in form or substance, with Section 1405 of the Compiled Laws of Utah, prescribing the manner of making findings in actions tried by the court, since the findings of fact and conclusions of law are not separated as the statute requires, and are so confused and intermingled with each other as to be ineffectual as findings of fact, or of law.

SECOND.

Said pretended findings are insufficient and do not support the judgment rendered, and will not sustain any judgment for the plaintiff.

THIRD.

The pretended findings of fact are contradictory of each other on material points.

FOURTH.

Facts essential to sustain the plaintiffs' action are not found in any manner whatever.

We assign the following errors to the *"Conclusions of Law:"*

They are not supported by the findings of fact, because it is not found, nor does it appear that the plaintiffs, the Highland Boy claimants, or any of them, are citizens of the United States, or entitled to locate or hold a mining claim on the lands of the United States.

It does not appear that the appellees entered upon the lands claimed by them whilst they were unoccupied public lands, and the contrary appears.

It does not appear what the local mining laws of the West Mountain Mining District were, though it does appear that there were local laws; it does not appear what acts were required of claimants of mining claims, by such local laws, to be done in the location and improvement of their claims within the district, nor does it appear what acts were done by the plaintiffs in locating and improving their said claim, either in compliance with the laws of the United States or of said district, and it does appear that the acts required by the laws of the United States in that behalf were not performed.

It appears that no location of the plaintiffs' pretended claim was ever made in accordance with law, the Court having found that an "ineffectual attempt" to locate the same was made in 1873, and afterwards finding that the plaintiffs made "the location" in 1873, and bases their title thereon.

ARGUMENT.

The decision of this cause in this Court will depend upon the sufficiency of the findings in the record to support the judgment of the court below.

The first error assigned is that the findings of the District Court do not comply with the statute.

Section 1405 of the Compiled Laws of Utah, 1876, is as follows:

"Upon the trial of an issue of fact by the Court, its decision shall be given in writing, and filed with the Clerk, within ten days after the trial shall have taken place. In giving the decision, *the facts found, and the conclusions of law, shall be separately stated.* Judgment upon the decision shall be entered accordingly."

There are in this record what purport to be, and are termed by the Judge signing the same, twelve separate "findings of fact," and one called "conclusions of law." We submit, herein, that an examination of these pretended findings of fact will show that they are a heterogeneous jumble of facts and conclusions, material and immaterial, confusedly and illogically thrown together in utter disregard of the intent and object of the statute.

The fifth and seventh findings of fact are those upon which the judgment in this action must rest. The first paragraph or sentence of the fifth reads, "that the discoverers and locators of said Omaha Mining Claim supposed that the vein or lode ran east and west, and so located it, and after such location and the recording thereof so claimed it."

Instead of finding the fact as to where and on what surface ground the Omaha claim was laid, we have a series of conclusions that "they located it" and "so claimed it"—the lode—to run east and west.

This is not a finding of facts, but a statement of the result of facts—mere conclusions. The court finds in the third finding that the Omaha claim was not marked out

on the ground until the survey for patent was made in 1877, and if not marked out on the ground, and it was recorded as "running easterly and westerly" according to its notice, upon what facts rests this conclusion that the owners claimed it to run "east and west?" Whether they claimed and located it east and west depends upon what they did at the time, and these facts are not found.

In the succeeding sentence to the first contained in this fifth finding we have an argument in these words "That the locators thereof (Omaha) and their grantors made *no claim* to a *contrary* course until the year 1877, when the Omaha mining claim was surveyed for patent, when it was claimed to run "northeast and southwest." The negative fact that "*no claim*" was made is put in as a reason for finding it to run east and west. If the court had found as a fact that the Omaha claimants had pointed out their ground to persons seeking information as to its limits, that would have been a pertinent fact, but a finding that the Omaha claim ran easterly and westerly by its notice of location in 1870, that the boundaries were not marked on the ground until 1877, when they were marked and surveyed northeast and southwest nearly, and then to state that in the meantime the location was made "east and west," without finding a single fact on which to base such a conclusion, is absurd, from the premises stated. Such a conclusion does not follow from what is stated, and is not consistent with the facts which are stated. If these findings are findings of fact, then the location or claim is found to run both northeast and southwest and east and west, but if they are regarded not as findings of fact, but as conclusions, they stand in this condition: The location by the notice runs easterly and westerly —it was marked on the ground afterwards by the survey northeast and southwest; it was located and claimed east and west, and no claim was ever made that it run any other way, the lode on its actual course is northeast and southwest. And if any person can tell *what is found* in such a series of statements, either of fact or conclusion, they will have accomplished a miracle

Treated as findings of fact, they are contradictory and irreconcilable; treated as conclusions of law, the result cannot be reconciled with the premises stated—they are in truth, neither one or the other.

The same objection, in greater force, applies to the so-called seventh finding of fact of the series. In every essential feature, this finding is a jumble of facts and conclusions both. Whether the land at "Highland Boy Discovery" was public and unoccupied in 1873, depended upon the question whether the Omaha location of 1870 embraced and covered it, and as that matter, if found at all, is found both ways, without stating directly either way. As already shown above, the statement here is a mere conclusion, supported by one of the findings before made, and antagonized by the other. The finding proceeds: "And in said year, 1873, made an ineffectual attempt to locate said lode, calling it the 'Highland Boy' and *said location* was perfected, made good and marked out on the surface in 1874, a full and proper record thereof being then made."

The statement of the discovery of a mineral lode may be taken as a statement of a fact, the statement that it was on public unoccupied land of the United States is a conclusion of law, resting upon facts to be first ascertained. The statement that the plaintiffs made an "ineffectual attempt" to locate it is a conclusion, not a fact; and the statement that said location—meaning what is just called an "ineffectual attempt" to locate—"was perfected, made good and marked out on the surface in 1874—a full and proper record thereof being then made"—is a series of conclusions with not a single fact to sustain either of them.

The eighth, ninth, tenth and eleventh findings all have the same infirmity. We will not further remark upon this objection. It applies with more or less force to every one of the so-called "findings of fact" in the record, as examination will demonstrate.

SECOND.

The second, third and fourth errors assigned may be considered together, as the argument will be found to be related and to have a common bearing on each one of them.

Treating them as findings of fact, we say, in the next place, that they are contradictory and irreconcilable.

It will attract the attention of this Court, at the threshold of this inquiry, that the findings, instead of pursuing the natural order laid down by the pleadings, where the allegations are made by one party and denied by the other, and finding upon each allegation, controverted as it is presented, begins with the affirmative matter set forth in the closing portion of the defendants' answer. This portion of the answer is, in fact, purely defensive, though pleaded in an affirmative form. Every fact to support it was equally admissible in evidence under the denials previously made. But there would seem to have been an unaccountable impression that the burden of this case rested on the defendants, instead of the plaintiffs, and it was evidently tried on that very manifestly false theory Pursuing this idea, the first six "findings of fact," so called, are devoted to setting forth the conclusions of the Court as to the defendants' "Omaha" claim. This crawfish style of walking backwards in the investigation, while, perhaps, not so objectionable as to vitiate the findings, if good in substance, will serve as a useful key to the result which was attained, and explain in some measure the blind and confused manner in which it was arrived at.

Returning to the objection that these findings are contradictory, before pretending to discuss the error alleged, we allude to its legal effect. We understand the rule to be: "That when the findings are contradictory in a material point, the judgment cannot be sustained."

Manly Wormly vs. Hawlett, 55 Cal., 94.

The correctness of this rule needs no argument. These findings are contradictory and irreconcilable.

The second finding is to the effect that the Omaha claim, as located in 1870, by the grantors of the present claimants, was located in an "easterly and westerly" direction from the point where the notice was posted, and claimed 2000 feet on the lode. The notice itself reads (See exhibit A, folio 15, Trans.) "running *along the lode* 1000 feet in an easterly direction, and 1000 feet in a westerly direction." Compare this statement with that in the fifth finding. The notice is found to give an easterly and westerly course to the vein or lode in the second finding, which is fully sustained by the notice itself in the record, while the fifth finding states that the "discoverers and locators supposed that the vein or lode ran east and west, and so located it and claimed it."

Bear in mind that this distinction between east and west, and easterly and westerly, is the vital matter involved in the case. We have then a finding that the Omaha claimants located a claim on and *"along" a lode,* by a notice which gave the direction of the claim as "easterly and westerly," and we have also a finding that they, at the same time, supposed the vein ran "east and west," and so located it and claimed it, the result of following the latter direction being to give the plantiffs the ground in dispute, and if the first finding was followed, instead of the last, to give it to the defendant.

Now the first statement that the claim was located running easterly and westerly on the lode cannot be reconciled with the second statement that it was located due east and west, for the court finds that the lode *does not* run east and west, but that it runs northeast and southwest. By giving effect to the words of the notice, "easterly and westerly," on and along the lode, which it finds runs northeast and southwest, and the acts of the claimants as found, the lode would have inevitably been adjudged in the disputed ground to be the property of the defendants. After making this finding, the court proceeds to say in the

fifth finding that the locators located and claimed the claim due east and west, and thus robs them of the lode they were found to have located in terms in a direction different from the one their notice states, and different from the one the court has actually found. The fifth finding, as a sort of apology apparently for a change of front on a fact, if the finding can be said to be a fact, adds "that the locators (Omaha) made *no claim* to a contrary course until 1877. What becomes of the notice under which the Omaha was taken and always held, and of the finding that it was taken and located by the notice? If claiming it to run easterly and westerly in terms *on and along the lode* is not claiming it in a contrary (or different) course from east and west, which is *not on* the lode at all, then we do not know what would be claiming it on an entirely different course.

The court states that we claim it where it finds it runs by the notice, and it then states that we claim it where it does not run, and again that we never claimed it in any direction except where it finds it did not run—viz. east and west. While we shall call attention to these two findings as insufficient in other particulars, we pass them for the present with the observation that their palpable contradictions are beyond all explanation.

The same suicidal defect exists as to the seventh and eighth findings of fact

After finding that the Omaha claimants have complied with the requirments of the law so as to have title to their claim, the seventh and eighth subdivisons state that the "Highland Boy" *discovery* was made on public lands, and after basing a location on "an ineffectual attempt" to locate in the last finding, sets out that the Highland Boy claimants "have been continually in possession of the ground in conflict ever since 1873"

Whether this statement was true depended upon whether the Omaha location embraced the ground in dispute, and after finding that the Omaha locators had claimed the lode and ~~find~~ it ran substantially as they

claimed it, to arbitrarily find that they only claimed a piece of barren ground off the lode, is simply to contradict the first finding. If the lode runs northeast andsouth west, and that is distinctly found,and we claimed 2000 feet of that lode running easterly and westerly from a given point,1000 feet each way on that lode, and did the work and acts to keep good the title—and that is not disputed—*then* the Highland Boy claimants were *not* in the lawful possession of the ground in dispute, or any part of it, because *we were in* lawful possession, and there cannot be two lawful antagonistic possessions at the same time.

If these findings are treated as findings of facts, they are so contradictory that no ingenuity can harmonize them, aside from their insufficiency, and if they are to be t eated as conclusions of law, they will, be found utterly unsupported by any facts stated in them.

Proceeding with the argument, we assert that these find'ngs are totally insufficient, considered in any character that may be given them, either as findings of fact or law.

The issue was made distinctly on the ownership and right to the possession asserted by the complaint to the disputed ground under the Highland Boy location.

It therefore devolved upon the plaintiffs in the trial to show that they were the lawful owners, and then in the possession, or entitled to the possession, of the ground in controversy, and that made it necessary for the plaintiffs to show by proof, and for the Court to find, every fact which is made by the law an essential element in the ownership alleged. In order that a judgment in their favor could properly be rendered, it was incumbent on the plaintiffs to establish, and the Court to find, the following essential facts:

FIRST.

That the plaintiffs were citizens of the United States, and entitled to claim and hold a mining claim.

SECOND.

That the ground upon which their Highland Boy

location was made was, at the date of location, public, unclaimed and unoccupied mineral land of the United States.

THIRD.

That a discovery of ore was made prior to the location.

FOURTH.

That the ground located was distinctly marked out, so that its boundaries could be readily traced.

FIFTH.

If a record was required and made, the notice of location recorded should contain certain requisites pointed out it Section 2324, United States Revised Statutes.

SIXTH.

Proof of what the local laws of the Mining District required of locators and claimants of mining claims, and proof that the acts and things required were performed in accordance therewith.

Keeping in view the rule that a finding of facts is neither a reproduction of the evidence introduced, nor the conclusions of law deduced from the facts established by the evidence, let us examine these findings and see if in any aspect in which they can be considered they furnish any legal basis for the judgment entered.

There is no finding that the Highland Boy claimants were citizens of the United States, or could locate or hold mining claims on the public mineral lands.

Sections 2319 and 2321, Revised Statutes, authorizes locations of mining claims to be made only by citizens of the United States, and those who have declared their intention to become such.

The rule is well settled that one who claims a statutory right or privilege must allege and prove all those things necessary to bring him within the statute, and no person is presumed to be within the statute until the fact is made to appear.

The fact is nowhere shown or intimated in the findings. This court does not know, and it might assume in perfect accord with all that is found in this record, that these plaintiffs are not only not citizens, but that each and all of them are subjects of China, and incapable of becoming such.

The requirement of citizenship is imperative and must appear, and it does not appear in this case.

Secs. 2319, 2321, Rev. Stat., U. S.
Chapman vs. Toy Long et al., 5 Sawyer, Cir. C. Rep.,28.
Noonday M. Co. vs. Orient, 6 Sawyer " " 304-5.
" " " " " 502.
Lee Doon et al. vs. Tish et al., 5 W. C. Rep., 596.

As to the general rule that one claiming a right conferred by statute must bring himself within the Statute, see:

Dye vs. Dye, 11 Cal., 163.
People vs. Jackson, 24 Cal., 630.
Lentz vs. Victor, 17 Cal., 271.

We may remark here that the defendants in this action set up the fact of their citizenship in the answer; the pleadings of the plaintiffs in this particular are as silent as the findings. We regard this defect as fatal to the judgment.

SECOND.

There is no finding that the ground in dispute was public mineral lands at the date of the pretended location by the Highland Boy claimants in 1873.

The seventh finding of fact, the only one that alludes to this question, states that in 1873 the plaintiffs discovered a vein or lode of mineral in public unoccupied land of the United States, at the point marked on Exhibit "G" "Highland Boy Discovery," and in that year attempted unsuccessfully to locate said vein, calling it the Highland Boy, etc.

This "discovery" is not in the disputed ground, as will be seen by an examination of the diagram, and hence the finding does not meet the question.

It will not be pretended that to discover a vein off the ground in controversy, in public land, is any evidence whatever that the ground in dispute was public, even it were found to be on the same vein, and whether it was the same vein in both claims in this case, the Court refused to find. {See Solis 24-25 Rans}

There is then no finding that this conflict ground at the date of the pretended location, in 1873, was open or unoccupied public land, nor any finding from which it can possibly be inferred. The case stands thus: The Highland Boy claimants assert that they are the owners of a certain piece of land claimed by the defendants, amounting in area to about two and one-half acres, out of a claim or parcel alleged to contain about seven acres. They claim to be owners of this conflict area by virtue of a location of the entire parcel of which it is part. To prove their title to the conflict ground, they show that a certain point, called "Highland Boy Discovery," *not on the disputed ground*, was public land at the time they claim to have made the location, and the Court so finds—and that is all that it does find on the subject. Is that, in any sense, a finding that the conflict ground was public land at the time of location? It has no tendency to show it.

THIRD.

Passing the third point, which may be treated as being sufficiently found, we proceed to the

FOURTH.

requisite, viz: That the ground located was distinctly marked on the surface so that its boundaries could be readily traced, as required by Section 2324, U. S Rev. Stat.

This proceeding is a condition precedent to a valid location, as much so as the discovery of ore within

the claim. If it is found in this case, it appears from the seventh finding.

In order to know whether the claim was marked on the ground as required, we have a right to know what was done in that regard. If an inclosure was made of the ground, that would be one way of marking it out. If a survey was made and posts or monuments erected along the exterior limits of the claim, that would be another way of marking it. If a notice was posted at the discovery, containing a diagram of the claim and such a description of it by metes and bounds that a surveyor could indentify its limits, that would be another way of marking it out. But whatever was done in that respect we have a right to know from the findings, for it is from facts to be found that we are to draw the conclusion as to whether this claim was ever marked out on the ground as the law requires. The conclusion we have, the facts, the acts done, are omitted. If findings are sufficient as findings of fact, which instead of stating the things done, state simply that the requirements of the law were fulfilled, then the profession have long been laboring under a great error in this regard.

Under a statute precisely the same as that in Utah, the Supreme Court of California says: "The findings of the court should be a concise and pointed statement of the *several facts found*, followed by the conclusions of law, without any *mixture of arguments or the evidence* from which the facts are found:"

Hidden vs. Jordan, 28 Cal., 301.

Again in the same case the court observes that "*an opinion is not a finding.*"

In a subsequent case (Palhemus *vs.* Carpenter, 42 Cal., 375,) the court again says: "The findings are so manifestly defective as not to require comment. Instead of stating facts involved in the issues, they contain only *general conclusions drawn from the facts.*"

"They afford no information whatever as to the particular facts which the court considered as established in the cause."

Applying these principles to the case in hand, we find that the statute requires that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," and the court, instead of telling us what in fact was done, gives us an opinion in these words: It (the claim) was "marked out on the surface in 1874."

We submit that such a pretended finding of fact is a mere conclusion, or opinion, and even as such, it does not go far enough to say that the "boundaries can be readily traced." The statute meant that the marking should be of such a character as to advise persons coming upon the ground that it was appropriated. There is nothing from which we can conclude that a single post, or monument, indicating the boundaries of the claim were ever in existence at any time.

FIFTH.

The revised statutes, Sec. 2324, require that to "all claims hereafter located (May 10, 1872,) all records made shall contain the names of the locators, the date of the location, and such a description of the claim located, by reference to some natural object or permanent monument, as will identify the claim."

No attempt to show a compliance with this provision of the statute is made, except in this seventh finding, upon which we have just commented. It finds that a record was made of this claim, but does not find that it contained either the names of the locators, the date of the location, a description of the claim by a reference to a natural object or any permanent monument, or anything that would identify it or its boundaries. The finding states that the effort to locate in 1873 proved "ineffectual," but that in 1874 "said location" (which it had branded as abortive when first attempted) was made good, without telling us how that was made good which

had been pronounced a nullity—"a full and proper record thereof being then made."

Under any construction of this language, can it be regarded as a finding of the facts required by Section 2324 to be essential to a mining location? It says "a full and proper record was made," which is the opinion of the Court on the facts, not the facts themselves. If the court had found that in the year 1874, the plaintiffs posted a notice on the claim, that they afterwards claimed it within a certain time—the time required by the local laws, stating what it was—filed a notice of the claim for record with the Recorder of West Mountain Mining District, that said record contained the names of A, B, C, D and E, the plaintiffs, or their grantors, and also contained a reference to some natural object, such as a pine tree, or a cliff of rocks, or a permanent monument (as the United States mineral monument), or some shaft or monument on the ground which served to indentify the claim, it would have contained the least that would suffice. Less than this would have been insufficient—more than this is usual, but less would make the finding ineffectual.

To simply express the opinion that the "location was pefected," without stating by what means, and "make good" without stating what was required to make it good, and that "a full and proper record was made" without either giving us a copy of the record or stating what it contained, is to withhold the facts instead of present them, and to substitute blind and lumping conclusions for that full and particular statement of facts which the law makes imperative.

Turning now to the eighth, tenth and eleventh findings, we are met with the same infirmity.

The eighth finding asserts that the plaintiffs "have been continually in the possession of said Highland Boy mining claim, embracing the ground in conflict, *since the location thereof in 1873.*" The preceding finding states the "attempt" to locate the Higland Boy was "ineffectual;" that is, it was abortive, was not a "location," and yet,

after making that finding, we are told in the next breath that the claimants of that location not made, were in the possession of it "ever since its location in 1873." Could contradiction be more complete?

Here is the injury done us. A location is pronounced ineffectual, and therefore void, and as if it had not been attempted, and then it is asserted to be a "location" upon which possession—that is title—may be founded.

This court in the case of Belk vs. Magher, 104 U. S. Rep., says: "The right to the possession comes *only from a valid location*, consequently if there is *no location* there *can be no possession under it*. Location does not follow from possession but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and local laws and regulations, etc."

Disregarding this obviously sound doctrine, the court below finds a lawful possession, and allows a party to to have the benefit ~~from~~ a location which it as distinctly finds was invalid.

The contest was not over or about actual possession, but was whether the plaintiffs had *prior possession under the mining laws*, which includes a lawful location and possession under it. No such location is found, and yet the party is found to be in that possession which makes title.

The conclusion, therefore, in these findings that the "plaintiffs were in the possession," is overthrown and negatived by what is stated. Possession, in the aspect in which it was presented in this case, was a question of law. The attempt to state it *as a fact* shows a complete confusion as to what was being tried. If the plaintiffs made a good and valid location acording to law, and occupied and improved their alleged claim as required by the acts of Congress and the local rules and laws, they had the lawful possession, but without establishing any lawful location by proof of the doing of the acts and things required by law

to invest a party with the right of possession, there was nothing to base such a conclusion upon, and it must be disregarded.

The eighth finding as to possession is based exclusively in terms on this abortive location in 1873. That the possession alluded to is ideal and is not intended to be stated as personal and exclusive, is shown by the works of the Omaha claimants in the disputed ground. (See exhibits 2 and 9, Trans.) The care with which it is stated that the plaintiffs have been continually in possession of the *Highland Boy claim*, embracing the ground in conflict, since the location thereof in 1873, and was (now) in such possession at the institution of the suit, and have continually worked and developed said mining claim, expending, etc., shows that the court found in plaintiffs' favor, not on location or possession. There is no direct assertion, nor could there truthfully be, that the the claimants of the Highland Boy ever performed a stroke of work or actually occupied a rod of the ground in dispute. More than one half of the area of their pretended claim was without any conflict. Their discovery was outside of any conflict, and the possession which is found for them is that which was supposed to follow from occupation and possession of the claim, the limits of which were made to embrace this conflict. Such a possession must grow out of compliance with law, and the facts showing such compliance must be stated, and not the mere arbitrary conclusions which a judge may derive from facts which he does not lay before us.

Another example of this wholesale finding of conclusions is found in the tenth finding of the series. It reads: "That the said plaintiffs, or their predecessors in interest, have in all things complied with all the law in that regard, both of the said United States and of said mining district."

There is not a pretense here at a finding of any fact.

Without attempting in any one finding to state what the local laws of the district were, while it does state that there were such laws, it is assumed that the contents of

such local laws and their requirements of locators of mining claims are fully known, and it is stated that they have "been complied with."

We have a right to know *what those laws were* in order to see what was required. The validity of the pretended location rested, not only on what those laws required, but on what was done to comply with them, and a finding that a location was "good," or "perfect," or in "compliance with all the laws," gives to this court, nor to us, the information which the findings are required to contain.

It would be a useless task to continue a further criticism of these findings of fact, which are relied upon to support the Highland Boy location. If our criticism of them, so far as they refer directly to the plaintiffs' case, are sound, this judgment must be reversed, and the findings applicable to the Omaha claim are immaterial.

But these findings include one or two important questions which deserve discussion and should be settled by this court.

The District Court which *tried* this action, as we have already observed, seemed to regard the Omaha claimants as having the burden of the case upon them, and the first six findings are directed to making findings more or less affecting the claim of the defendants.

The first of the series states that the Omaha mining claim was discovered by M. R. Williams, in 1870; "that the *prospecting* for the lode was done by him at certain points, etc.—referred to in the proofs.

Let us pause to consider what purpose it could serve to show who first discovered a claim when there was no contest as to priority of discovery, or what significance there can be as to the course or direction that some "prospector" worked in looking for the lode before it was located? Are the subsequent locators of the Omaha to be deprived of their lode where it runs as they located it, because a prospector, before they took possession, or one

of their number afterwards, thought it ran where it did not? Why is this irrelevant matter thrust into the forefront of the very first finding, unless it is expected to prejudice the Omaha claim by an immaterial statement? It is not found that the Omaha claimants, under whom these defendants derived title, ever pointed out their surface ground, or their lode, in the direction that Williams worked, or that the Highland Boy claimants located on such assurances.

This finding is so manifestly a side blow, and intended as an argument, that we do no injustice to any one in imputing its origin to the thoughtfulness of counsel in the cause, instead of the Judge adopting the findings.

The next finding, the second, after stating that a notice of location of the Omaha was posted, giving its length and general direction "on this vein or lode," states who did it, and the point of discovery. Except for its extreme poverty of fact, the finding calls for no remark —it is good as far as it goes.

The succeeding finding, the third, is a curiosity. It states gravely: That said claim—meaning Omaha—"was not marked on the ground until 1877, long subsequent to the location and marking of plaintiffs' claim that the location notice referred to no natural or artificial (or surface) monument or boundary."

The Omaha location notice is in the record and part of the pleading What it did contain, or did not, is easy to see by inspection. Why such pains to tell us that it *did not* contain a reference to any natural object or boundary? In the case of the Highland Boy notice, it was neither in the pleading, nor were its contents stated, and of its matter we are ignorant, but, while leaving us in darkness on the Highland Boy notice, there is haste to tell us in a solemn finding what a paper open to inspection *does not contain.*

The finding states that the Omaha was never marked on the ground until the year 1877. What of it? The law requiring mining claims *thereafter* located to be

marked on the ground, and the record of them to contain certain requisites, not found in the Omaha notice, was passed *two years after the Omaha claim was located*, and more *than two years before* the Highland Boy was alleged to have been located The implication would seem to be, from the terms of this finding, that the prior location of the Omaha is to be affected because the Highland Boy ground or claim was first marked on the ground. The 17th Section of the Act of May 10th, 1872, negatives any such proposition as this, and yet it is evident that the Court below deprived us of this Omaha location, made in 1870, and kept up till this contest, because we did not *when it was located*, comply with the requirements of a statute passed two years afterwards!

We were adjudged to lose our ground because the Highland Boy claimants, nearly four years after our location, "marked out" a part of it in a location made by them. Such a position is not worth a serious argument. We submit that a judgment that the Highland Boy claimants are the owners of the disputed ground, because they included in the lines of a claim made by them under a statute *requiring* a marking of boundaries, not in existence when the prior claim was located, must be erroneous.

There is a point presented by the fifth finding in relation to the Omaha claim that we desire to comment on. The finding, fairly construed, presents these facts, and, taken in connection with others, it may be stated thus: At the time of the original location of the Omaha claim, the actual course of the vein or lode was not ascertained; its direction, as since shown by development, is almost northeast and southwest, and the locators, in their notice, gave its direction and claimed their ground along the "lode" easterly and westerly, believing that it ran in that direction. When the claim was surveyed for patent, the survey was made to conform to the direction of the lode; that the terms "easterly and westerly" mean in law "east and west," and although the lode does not run in that direction, and the Omaha claimants will lose

the lode by making their claim run in that way, yet, as the notice claims "east and west" (in law), and the Highland Boy claimants marked out the ground in conflict first, they shall be adjudged the owners.

This we take it, is a fair statement of the reasoning upon which this finding was made, and the Highland Boy claimants held to be the owners.

We must insist that it is radically wrong and unsound.

The Omaha claim is a location made under the Act of Congress passed in 1866. That Act only required the locator to comply, in making his claim and improving the same, with the local laws. Neither stakes, nor monuments, nor records were required—exterior boundaries were never thought of in a lode claim, and the Act of 1872, which made a radical change in these respects, had no application to this one. The rule that easterly and westerly must be construed "east and west," was equally inapplicable. The rule is one adopted by courts to prevent a failure of a deed, or a grant, and to give effect to that which, without it, would fail for uncertainty.

Fratt vs. Woodward, 32 Cal., 219.
Faris vs. Phelan, 39 Cal , " 612.

Here, in order to defeat a party's intention to locate and claim a lode, it is applied, not to uphold intention and sustain a grant, but to overthrow both.

To furnish a basis for this construction, it finds what the notice of location does not contain (see Finding 2), and the finding is contradicted by the wording of the notice. The statement in the finding is, that the "notice does not refer to any material or artificial surface monument or boundary. The notice reads "commencing at *this shaft* and running along the lode, &c."

There are *two monuments* named in this notice, one the lode itself, which nothing but a convulsion of nature

could move; the other, a "shaft" sunk in the earth and quite as permanent as anything reared upon it. In order to furnish a plausible reason for applying a rule to destroy our claim, a finding is made as to the contents of the notice, which inspection of the paper referred to overthrows at a glance. No miner would fail to understand, on reading the notice, that the intention was to claim *the lode* there discovered, and no court has the right to say the locators meant otherwise. They claimed "the lode, with all its dips, angles and variations," the exact language of the granting section in the act of 1866, and to deprive them of this grant because they did not anticipate the requirements of the act of 1872 (Sec 2324 of the Revised Statutes,) is as illegal as it is unjust. "Easterly" and "westerly" are interpreted due "east" and "west" *when there is nothing else in the instrument to indicate the intention.* In this case, *the intention* of the parties to locate and claim this lode, whatever variation within "easterly" and "westerly" it might take in course, is too evident for dispute. The lode itself is a permanent thing. It might take time and money to precisely fix the course of it, but then there was no possibility of changing or swinging the lode itself, and hence the lode being the purpose of the location, any attempt by an arbitrary interpretation to make that notice cover ground which did not contain the lode, in order to create a vacancy on the lode for subsequent claimants, is in violation of every principle of right. Section 2344 of the Revised Statutes effectually prevents all such injustice.

We submit, finally, that from the first to the last of this series of findings there is displayed an utter disregard of the requirements of the law, and the office and design of findings.

They are profuse in conclusions on points that are totally immaterial, and studiously silent on vital issues. They find with particularity not only what is contained in exhibits in the record, but also what they do not contain, and say not a word of the contents of like notices which must be spread out in the finding literally or in

effect. They juggle with the questions of "location" and "possession" as now a question of fact, and again a matter of law, so as to leave the parties in complete confusion as to what was intended to be, or what was disposed of, but for the decree.

We are told not only that the Omaha claim is not good as against one located four years later but the reasons assigned, viz., that a prospector worked in hunting for the vein in a direction not identical with that in the survey; that it was not marked on the ground till after the subsequent locators had marked their claim; that the notice did not refer to any surface monument, are so frivolous as to indicate that the whole judgment is based on a complete misconception and misapplication of the law.

The finding of a lawful possession, which entitles the plaintiffs to a decree of title without showing a single requirement of the law in regard to making a location complied with, evinces such a misapprehension of the judicial function exercised in such cases that nothing less than a complete reversal can meet the demands of justice in this case.

In furtherance of a seeming purpose to sustain the plaintiffs claim at all events, the finding goes so far as to say that the Highland Boy claim substantially conforms to the course of the lode (see ninth finding of fact). Exhibit "G," to which this finding refers, shows that the Highland Boy claim, as surveyed, has a direction north 73°30′ east and south 73°30′ west. While a variation of 22°50′ from the Omaha, notice by an arbitrary construction never intended, is made destructive of its title, a variation of 29°30′ in the Highland Boy notice from the true course of the lode is treated as in "substantial conformity." And other examples of equal incongruities and inconsistencies might be noticed, but we forbear.

We submit a few general observations in conclusion.

The defendants, who had for seven long continuous years worked in their claim, and never had an inkling

even of a conflict until they made application for a patent, after a delay of years in the trial by the plaintiffs, are by this decision deprived of their mine and its works (see Exhibit 2) in favor of claimants, the basis of whose claim, ~~indicated~~ initiated three years subsequently to the defendants, is stigmatized in the findings as an "ineffectual attempt" to locate a claim, and yet acquire such a "possession" by it as to annihilate the older claim and possession.

We respectfully submit that no such ~~provision~~ possession of law or justice can be upheld in this tribunal.

We regret that the entire record of the Court below could not be made the subject of a reexamination here. We were compelled by the statute to take the findings as they were reported by the Court, and while many errors in the proceedings might have been reached, as questions of law, those apparent in the record presented, seemed of sufficient gravity to give us the reversal we seek, without multiplying them in number and increasing the labor of this Court in their examination.

We submit that this decree cannot be sustained.

J. G. SUTHERLAND and
JOHN R. McBRIDE,
Attorneys for Appellants.

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Supreme Court of the United States.

OCTOBER TERM 1885.

No. 83.

JAMES J. O'REILLY and JAMES W. KENNEDY,
Appellants,

vs.

JAMES W. CAMPBELL, FRED. T. BENSON, HERMAN LUCKIN, and ELIZABETH DUDLER,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR THE APPELLEES.

BY

SHELLABARGER & WILSON,
Attorneys.

THOMAS McGILL & Co., Law Printers, Washington, D.C.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

Brief for Appellees.

The case comes here by appeal from the Supreme Court of the Territory of Utah. It was one in equity brought in the District Court of the Third Judicial District of that Territory by appellees against the appellants, to restrain the appellees from further prosecuting an application for a patent from the United States for that portion of a certain mining claim being then prosecuted for patent by the appellees, such mining claim of appellants being called "Omaha," which overlapped and conflicted with a certain other mining claim called the "Highland Boy," the latter being prosecuted for patent by the appellees. This "overlap"

was in extent two acres and seventy-six hundredths, as appears by the pleadings. (R., p. 2, fol. 5.)

The question of fact in the court below was which of these two mining claims was prior in time in the making of a valid appropriation under the mining laws by location, etc., of this overlap. The case was one, therefore, not triable by jury, and came within the proviso in section 1 of the Act of April 7, 1874. (18 Stats., 27.)

Since that proviso requires

"That on appeal, instead of the evidence at large a statement of the facts in the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree,"—

—therefore, in the trial here, this court is limited, for the purposes of the present review, to two matters required to appear in the record, namely:

First. The "statement of the facts in the case in the nature of a special verdict" as found by the court below; and

Second. The rulings of the court below on the admission or rejection of evidence when excepted to.

The action below was one prosecuted in obedience to the requirements of section of 2326 of the Revised Statutes, which requires an adverse claimant to commence proceedings in a court of competent jurisdiction within 30 days after filing his adverse claim. It appears by the Record (p. 2) that on the 1st of March, 1877, the defendants below, the appellants here, filed an application in the Local Land Office at Salt Lake City for a patent for the Omaha mining claim; that during the publication of the notice of this application, to wit, April 28, 1877, appellees filed their adverse claim in the Land Office for the mining claim "Highland Boy," and commenced the present action within 30 days from filing the adverse claim, to wit, May 25, 1877. (R. p. 3.)

On the 9th of August, 1877, the answer of the appellants was filed. (R. p. 6.)

On the 14th of May, 1881, the District Judge, Emerson, rendered a decree in the case in favor of the plaintiffs below, the appellees. (R. p. 11.)

No copy of a motion for a new trial appears in the record, but it appears by the record that a motion for a new trial was made. What the motion contained does not expressly appear; but it appears that the motion was by the court overruled *pro forma* and exceptions taken by defendants below. (R. p. 11.) This motion for a new trial seems to have been based upon section 1420 of the Compiled Laws of Utah, p. 453, which provides "that when the ground of the motion is error in law, the statement shall specify the particular errors upon which the party will rely, and if no such specification is made the statement shall be disregarded."

And further provides:

"The statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain the particular points thus specified, and no more."

Section 1415, Compiled Laws of Utah, 452, provides:

"That no particular form of exception shall be required. The exception shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more, and the whole as briefly as possible."

The "statement" in this case is found in the Record, beginning at page 1 and ending at page 12, where a stipulation appears in these words:

"We have settled the foregoing statement on motion for new trial and certify that the same is correct, and we also stipulate that it may be used in case of an appeal from the judgment as a statement on appeal." Dated October 4, 1881; signed Marshall & Royle, attorneys for the plaintiff; Sutherland & McBride, defendants' attorneys.

The date of overruling the motion for new trial does not appear in the Record. The case was appealed to the Supreme Court of the Territory and there decided on the 13th of July, 1882. No part of the Record of this trial is given, except the judgment of the court, (top of p. 14,) which is a general affirmance of the judgment below. The Record fails wholly to show any other part of the proceedings before the Supreme Court in this case. No indication is furnished by the Record as to any exceptions, omissions, or other things occurring in the trial there. An appeal was asked to the Supreme Court of the United States and a bond fixed at $300.

There is no allowance of the appeal by the judge, except as indicated in the citation, (R., pp. 15 and 16,) which is signed by him.

The certificate of the clerk of the court (R., p. 16) only certified that in pursuance of the appeal and attached citation, on which the certificate was endorsed, he herewith returns to the Supreme Court of the United States "said citation, with proof of service endorsed, and a transcript from the record of *parts* thereof, and of the entire proceedings of said Supreme Court of Utah Territory, with prayer for an allowance of appeal and bond on appeal, all in and of the case in said citation entitled;" and that he "hereby certifies that the said transcript is a full, true, and correct copy of the several originals thereof on file or of record in my office."

It will be seen by an inspection of the statement or bill of exceptions (R., pp. 1 to 12 inclusive,) that this statement contains no part of the evidence, whatever, produced on the trial in the District Court; nor does it anywhere appear in the record, in any way, that any evidence whatever was forwarded to the Supreme Court of the Territory. There is in the record no stipulation, except as stated below, dispensing with the production of any part of the evidence, acts, proceedings, or motions which occurred at either trial.

There is (R., p. 13) a stipulation, dated December 1, 1880, waiving the production of proof of transfers of title from original locators, etc.; this made for "the purpose of this trial only." There is also a stipulation (R., p. 13) that Exhibits G and 2 and H may be added to the statement or used thus, with or without being annexed. But these stipulations do not dispense with anything required by law or otherwise regarding the proceedings of the courts and the trials therein.

Under this state of the record we submit to the court the following propositions:

I.

That this case having been tried by the court below, and not by a jury, if appealable to this court, must be one of the character provided for in the act of April 7, 1874, (18 Stats., part 3, p. 27,) because every case tried by the court below, whether one in equity or at law, can only be reviewed by appeal as distinguished from writ of error.

Hecht *v.* Broughton, 105 U. S. 235.

The record in this case shows affirmatively that "a statement of the facts of the case in the nature of a special verdict, and also the ruling of the court on the admission or rejection of evidence, when excepted to," was not "made and certified by the Supreme Court below."

This is shown as follows:

1. The statement (R., pp. 1 to 12) shows affirmatively that it was made for the purposes of appeal to the Supreme Court of the Territory, and it contains no part of the evidence whatever as required by section 1420 of the Compiled Laws (p. 454.) requiring it to "contain so much of the evidence, or reference thereto, as may be necessary to explain the particular points thus specified, and no more"—such section requiring that the "statement shall specify the particular errors on which the party will reply."

2. The clerk's certificate, (R., p. 16,) while certifying that only parts of the record of the court below are in the record certified, certifies that "a transcript of the entire proceedings of said Supreme Court of Utah Territory," is in the record—which record shows nothing whatever of any evidence being taken to, or being considered or acted upon by the Supreme Court of the Territory.

3. The brief and argument in this court for the appellants deals with and treats the facts as found by the District Court, and not by the Supreme Court, throughout. (R., p. 6, et seq.)

Said section of the Compiled Laws of Utah affirmatively requires so much of the evidence as is necessary to explain exceptions to be in this statement, and none such is there found.

In the case of Stringfellow *v.* Cain, (99 U. S., 610,) this statute of 1874 received, in the particulars here involved, its first interpretation. There the court held that where it appeared that all the evidence was before the Supreme Court, and that the Supreme Court either affirmed the judgment or reversed the judgment, upon the ground that the facts, as found, did not warrant the judgment, then such general judgment would be held to be a finding of the facts by the Supreme Court as found in the court below. But this court also expressly held that a finding of the facts by the Supreme Court was essential to make the case appealable to this court under the statute.

This court there held that it would make the judgment below to be an implied finding of the facts because it affirmatively there appeared that all the evidence was before the Supreme Court of the Territory.

The same is true of the case of Neslin *v.* Wells, (104 U. S., 428,) where the "statement" embraced the proceedings on the trial, including all the testimony, and also the finding of the court as to matters of fact and its conclusions of law specially stated. (Top of p. 429.)

In the case of Davis *v.* Fredericks, (104 U. S., 619,) speaking of this act of 1874, this court says that "as such appeals lie to this court only from the Supreme Court of the Territory, it follows that the statement both as to facts and rulings on which we are to act must be made directly or indirectly by that court."

In that case the only questions presented to the Supreme Court of the Territory were those which arose on the ruling of the District Court in the admission or the rejection of evidence, and its charge to the jury, so that in that case no findings of fact by the Supreme Court were required to enable an appeal to be taken to this court.

The case of Gray *v.* Howe (108 U. S., 12,) is one expressly holding that statement of the facts in the nature of a special verdict, under this act of 1874, must be made by the Supreme Court in order to give this court jurisdiction to review the decision below.

The case of Eilers *v.* Boatman (111 U. S., 356,) is to the same effect as the preceding cases, in recognizing the obligation of the Supreme Court to find the facts, and of this court "to accept the findings of fact made by the Supreme Court of the Territory as true on appeal to this court."

It was the evident purpose of the act of 1874 to permit this court to be burdened with the trial of no questions of law arising upon facts found below, unless found in the Supreme Court. That law designed that the Supreme Court, or court of last resort in the Territory, should pass upon the questions of fact which become the basis of the legal conclusions of the court below, before the Supreme Court of the Territory should be permitted to decide a question of law, which question of law should be reviewable here.

We do not know, outside of what is disclosed by the record, what trial of questions of fact upon the evidence occurred in the Supreme Court of the Territory. This

court is not permitted to go outside of the record for the purpose of learning what evidence was in the Supreme Court, and what facts that court passed upon.

Davis *v.* Packard *et al.*, 6 Pet., 41; 7 Pet., 281–2.
England *v.* Everhardt, 112 U. S., 502–505, and cases cited.
Young *v.* Martin, 8 Wall., 354.

Hence this court must dismiss the present appeal for want of jurisdiction, or if not that, affirm the judgment of the Supueme Court of the Territory.

II.

The record in this case is not properly certified according to law, and hence the case is not properly in this court, and must be dismissed.

III.

We now turn to a statement in reply to the errors assigned in the opposing brief upon the rulings and judgment of the court below, which the brief considers as the errors of the District Court; we, of course, not waiving, by this discussion, objections to the sufficiency of the record here.

In regard to all the errors involved in the court's findings of fact, we state that the assignments of error (Brief, p. 4) are insufficient, owing to indefiniteness, in this, that the first assignment does not state wherein, or in what respect, the findings of fact below confuse findings of fact and conclusions of law. And the second assignment is insufficient in that it does not state the particulars in which the findings of fact fail to sustain the judgment. And the third is defective in that it fails to state wherein the findings of fact are contradictory. And the fourth assignment is in-

sufficient in failing to state what particular additional facts should be found in order to sustain the judgment.

Owing to the indefiniteness of the first four assignments of error, (Brief, pp. 4, 5,) we will consider, in mass, what seems to be covered by these four assignments alleging: 1. Blending in one finding conclusions of law and fact; 2. Insufficiency of facts found to warrant the judgment; 3. Contradictory character of the facts found; 4. Absence of essential facts required to sustain the judgment.

In considering these assignments, for the purpose of getting at what they mean, we must resort to the supposed equivalent assignments of error in the District Court, (R. 12.) These are embraced in paragraph II, under subdivision 1.

We regard it as sufficient for the purposes of this case to answer, in the mass, every one of the contentions in the appellant's brief, asserting that the findings of fact, as embodied in the record, are conclusions of law, as distinguished from findings of fact, and also as to the court's having omitted to find the *probative* facts, as argued in the brief, by such cases as the following:

Eilers *v.* Boatman *et al.*, 111 U. S., 356.

There the court states that the following findings in a mining claim were not conclusions of law, but findings of fact:

"First. That the notice of the location in the Nabob mining claim contained a *sufficient* description by reference to natural objects and permanent and well-known monuments to identify the claim.

"Second. That the said Nabob claim was *so* marked on the ground that its boundary could be readily placed."

The case of the Francis Wright, in admiralty, (105 U. S., 381,) where the findings of fact and conclusions of law went to this court under the Act of the 6th of February, 1875, which, in substance, confined the jurisdiction of this

court as it is confined under the law of 1874. This Act of 1875 limits the revisory power of this court to questions of law and to the legal result of the findings of fact by the court, in the nature of a special verdict. Under that statute this court held that it was the ultimate facts which were by that statute designed to be found and sent to this court as the predicate for its review.

On page 387, the court, speaking of the effect of this statute, condemns the practice of sending up in the record mere probative, or, as the court calls it, "incidental" facts, which only amount to evidence bearing upon the ultimate facts of the case. The court says:

"Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below, and the fact in respect to which such an exception may be taken must be one of the material and *ultimate* facts on which the correct determination of the case depends.

In the present case the ultimate fact to be determined was whether the loss for which the suit was brought happened because of the insufficient refrigerating apparatus or the unseaworthiness of the vessel. It is found, in express terms, that the loss was caused by the defective construction and working of the refrigerating room and apparatus connected therewith, either from inherent defects in the said apparatus or from not using a sufficient quantity of ice, and not by fault of the claimants."

The court adds that it "was unimportant to inquire whether the vessel was seaworthy or not." In other words, the ultimate fact was that the defective refrigerating room and apparatus caused the loss. Every probative fact tending to show wherein and why apparatus was defective was treated as incidental or probative, and not ultimate.

The case of Sun Ins. Co. *v.* Ocean Ins. Co., (107 U. S., 485–500,) arose under the same act—February 16, 1875—as did the last preceding case, and where the facts were required to be found in the nature of a special verdict. The substance and effect of that case is the same as the

preceding ones, namely, in holding that it is the *issuable* fact, the facts essential to the determination of the right aimed at being asserted by the pleader—the facts which must appear to exempt the pleading from liability to a general demurrer—they are these facts, and these only, that are deemed ultimate facts within the sense of statutes requiring facts to be found in the nature of a special verdict. Every fact of less significance or dimensions than those which must appear in a declaration, or a pleading, is regarded by this decision as probative or incidental. The court holds that even where they appear in the Record they are disregarded and cannot be considered as against the findings of the ultimate facts, or the facts put in issue. (See the authorities there cited.)

Before passing from this case we wish to allude to another feature of it which has bearing upon another point than the one now being considered. At the bottom of page 500, after quoting from Collins *v.* Riley, (104 U. S., 327,) the court qualifies what is there said by saying that facts admitted by the pleadings, etc., need not be found by the court.

In the case of The Abbotsford, (98 U. S., 440–444,) arising under the same act of 1875, the court holds the same thing, using at the top of page 444 these words:

"The facts so found are to be ultimate facts or propositions which the evidence shall establish in the nature of a special verdict, and not the evidence on which these ultimate facts are founded."

See also the case of—

Pico *v.* Cuyas, 47 Cal., 174–178.
Heigh *v.* Peck, 30 Cal., 286.
Jones *v.* Block, 13 Cal., 329.
Matthews *v.* Kinsell, 21 Cal., 550.
McEwen *v.* Johnson, 7 Cal., 260.

Section 1400 of the Compiled Laws of Utah makes a special verdict to be that which "shall present the conclu-

sions of fact as established by the evidence, and not the evidence to prove them."

This is similar to the analogous act in California

The assignment of errors, as we have said, in this court (Brief p. 4) is utterly indefinite in regard to particularizing the specific things in which the conclusions of law are said to be not separated from the conclusions of fact, and in regard to wherein the findings are insufficient to support the judgment, and in regard to wherein they are contradictory of each other. Moreover no error will be regarded here which was not specifically called to the attention of the court below. Therefore the best we can do in presenting in this brief the particular errors coming within the above authorities is to look at the assignment of errors in the District Court, (which, by the way, it is totally incompetent for this court to review, because not rulings of the Supreme Court.) (R. p. 12.)

There it will be seen (R. 12) that it was assigned as error below that the words in the 5th finding, (R., p. 7,) "the discoverers and locators of the said Omaha mining claim supposed that the vein or lode ran east and west and so located it, and after such location and the recording thereof so claimed it," is not a finding of fact by the court that the location was made, and was made east and west.

Also that the words in the 7th finding, (R., p. 7,) "and said location was perfected, made good, and marked out on the surface in 1874, a full and proper record thereof being then made," are a legal conclusion. And also that that part of the 7th finding which states, as follows, "that in 1873 the plaintiffs or their grantors discovered a vein or lode of mineral in public unoccupied land of the United States, at a point marked on the plaintiffs' Exhibit G as Highland Boy discovery, and in the said year 1873 made an ineffectual attempt to locate said vein or lode, calling and designating it the 'Highland Boy,' as described in their complaint," is a legal conclusion, and not findings of fact,

that this land was unoccupied and unappropriated public land.

It is insisted, in substance, in the brief, that these findings do not show anything but legal conclusions, and do not, as findings of fact, either find the fact that appellants located their claim east and west, or that the finding establishes that the location of 1874 was ever in fact made and marked as stated in the seventh finding, or that the land on which the Highland Boy discovery was located was unoccupied and unappropriated public land.

The contention is that in the finding of fact in regard to the location of the Omaha mine, and in regard to the location of the Highland Boy mine, and in regard to the status of lands as public lands, it was necessary for the court to find that monuments were set, in making the location, or that surveys were made, and the other details, in the nature of probative facts, must be found by the court; and, further, that the court was required to find wherein, how, and why the lands were made to be public lands.

The authorities above cited render it unnecessary to say more in regard to this contention than that it is totally without foundation in law.

Another error assigned in the District Court (R., p. 12,) is that what counsel called conclusions of law, in the preceding specification, are not warranted by any findings of fact. In other words, this assignment converts the findings of fact establishing the non-location of the Omaha mine upon the disputed land, and the finding as to the perfected location of the Highland Boy claim in 1874, and the finding that the latter was located upon unoccupied public lands, into mere conclusions of law; and having destroyed them as findings of fact, then assigns as error that there was no finding of fact upon which to base those conclusions of law.

Stated in another way, it is an assignment which de-

stroys all the material findings of fact by converting them into conclusions of law, and then saying of these conclusions of law that they have no facts to support them.

The next assignment is that the court erred in giving any effect to the finding in the seventh finding of fact (R., p. 7,) in regard to the plaintiffs having discovered a vein or lode in the Highland Boy, as set forth in the seventh finding. This court cannot know what effect the court below gave to this part or any other part of the seventh finding, or any other finding, except that this court knows that upon the findings in their entirety a judgment was rendered. Therefore what particular finding was relied on in rendering the judgment by the court below, is not a matter disclosed by the record or which can be reviewed here. If there is that outside of the language pointed to in assignment 3, (R., p. 12,) in the findings of fact as an entirety, which will support the judgment, then it is immaterial what effect the court gave to the words quoted from the second finding in this assignment 3. But the words quoted in this assignment 3, so far as it is a quotation at all, relate to the fact that a vein or lode was discovered prior to the location. This is an essential fact. It is distinctly found in finding 7, and to say of it that the court erred in giving any effect to it, is plainly a frivolous assignment.

Assignment 4 (R., 12) is one directed against the conclusion of law reached by the District Court (R., p. 8) finding that the plaintiffs below—the appellees here—were the owners of the disputed land, with the exception of a small tract. This is not a *specific* assignment of errors, and is, in its element, like the sixth assignment, (R., p. 12,) that the court erred in rendering the decree which it did. Whether the court erred in rendering the decree which it did depends upon the facts, as an entirety, which the court finds.

Upon this general subject, in addition to the authorities above cited bearing upon this point, our general proposi-

tion is this, and will be found to be fully sustained by the authorities, that in rendering a judgment upon the facts found in the nature of a special verdict the court will be governed by the following rules:

First. That they will take into view and consider together as an entirety the legal effect of all the facts found, and also the issues made by the pleadings and the facts admitted by the pleadings.

107 U. S., bottom of p. 500 and top of p. 501.

Second. That the court, in rendering such judgment, will confine itself to the ultimate facts as found by the court or jury, and will exclude from its consideration the incidental or probative or circumstantial facts tending either to establish or to question the ultimate facts actually found and reported.

Third. That in determining the weight and effect of all the ultimate facts so found and those admitted by the state of the pleadings, the court will place them together in their due legal relations to each other, and will obtain its judgment from the combined effect of the whole.

Fourth. If, in considering these facts as a whole, the court should find inconsistencies and repugnancies which, as a matter of law, are not necessarily fatal to the judgment asked, then the court will reconcile, on legal principles, the facts with each other, and render a judgment accordingly.

Fifth. Where there is any repugnance between a general and a specific finding of fact, the court, in reconciling the inconsistency, will give effect to the specific finding, and cause it to modify the general finding to the extent of the repugnancy between the two.

A convenient collection of the authorities upon all these points will be found in the case of—

Barnes *v.* Sanborn, (10 Nevada, 248,) where the court state as follows:

"The findings of fact by the court are like a special verdict of a jury, and must be taken in connection with the pleadings to support the judgment. (Swift *v.* Maybridge, 8 Cal., 445; Reynolds *v.* Harris, 8 Cal., 617.) They cannot be detached from each other, but must be read together for the purposes of ascertaining their meaning. (Mildred *v.* Hathaway, 27 Cal., 140; Kimball *v.* Lomans, 31 Cal., 156.) And if there is any conflict of discrepancy between the general and specific findings, the specific findings must prevail. (Hidden *v.* Gordan, 28 Cal., 302.)"

The authorities cited in this extract are in exact harmony, as it will be perceived, with the cases we have above cited from the decisions of this court, so far as they bear upon the same subject-matter.

The fifth assignment of error in the District Court (R., p. 12) is one that cannot in any possible view be considered in this court, because it is an exception to the ruling of the court in refusing to amend its findings. Whether the court erred in refusing to amend its findings when the motion is based upon the weight of evidence, this court cannot consider. If this error, No. 5, is to be deemed one presenting to the court a question of law based upon an error of law in making findings—as, for example, by blending in one finding conclusions of law and conclusions of fact—then that matter, if assigned as error below, is one which is disclosed by the face of the finding itself, and is covered by assignment No. 1, paragraph II, on page 12. This we have already considered, but we now add that any error of law of this kind, apparent upon the face of the findings of fact, must have been, in the court below, called to its attention by a specific exception. This is required,

as we have seen, by the practice act of Utah, and by the general principles of law enforced in this court.

The sixth assignment of error in law is a general one, that the court erred in rendering the judgment which it did. This is an assignment which does not specifically direct the attention of the court below to the error complained of, and is not available in this court, and was not in the court below. The practice act of Utah, which we quote in another place, expressly prohibits the court from regarding exceptions and assignments of error which are not "special." And in this court the rule disregarding vague and general assignments like this is settled and thoroughly familiar.

But if this sixth assignment were here available it is without foundation. The District Court, in finding the facts, observed the proper order in first ascertaining whether the Omaha location (which, if legal, was prior in time) was indeed valid, and therefore one which defeated the location of the Highland Boy in 1874.

In regard to this, we now state the substance of the findings of fact, for the purpose of inquiring whether all facts necessary to the judgment were by the court found.

The first finding, in brief, is that Williams in 1870 discovered the Omaha mining claim and did work at the point marked "Pine Tree" in plaintiffs' Exhibit G, etc.

The 2nd is that the notice of the Omaha location, claiming 2100 feet of this vein or lode running eastwardly and westwardly from this point, was posted on the claim by Angel in 1870, marked on Exhibit G as "Alderbush."

The 3rd is that this "Omaha" claim was not marked on the ground until 1877, long after the location and marking of the plaintiffs' claim, and that the Omaha location notice referred to no natural or artificial or surface monument or boundary.

The 4th is that whatever title this Omaha location gave has been vested in the appellants, defendants below.

The substance of the 5th finding is that the locators of the Omaha claim supposed the vein or lode ran east and west, and so located it—that is, east and west—and that after such location and recording thereof, they claimed it as so running. That the locators and their grantors made no claim to a contrary course until 1877, when the claim was surveyed for a patent, at which latter time they claimed it to run northeast and southwest, as shown in their Exhibit 2. That the vein they claimed as their discovery did not show on the surface, and that its course had not been discovered in 1874, but that subsequent developments had demonstrated that it ran northeast and southwest.

The 6th assignment finds that the appellants and their grantors have complied with the local and United States Mineral Laws regarding the work required upon their mining claims as originally located, worked, and claimed by them.

The 3rd and 5th findings of fact are, therefore, taken by themselves and alone, utterly fatal to the Omaha claim to the land in dispute, and it leaves the land vacant until the year 1877, so far as the Omaha claim is concerned.

Having thus found the Omaha claim to the disputed land to be worthless, in 1873 and 1874, the court proceeds logically to determine the facts bearing upon the validity of the Highland Boy claim.

The substance of the 7th finding is one finding that the plaintiffs below and their grantors discovered a vein in public, unoccupied lands of the United States, at the point marked in Exhibit G as "Highland Boy discovery." That in 1873 they made an ineffectual attempt to locate the vein, designating it as the Highland Boy, and this location of 1873 was "perfected, made good, and marked out on the surface in 1874, a full and proper record thereof being then made."

The 8th finding is, in substance, that the plaintiffs below and their predecessors in interest have been in possession

continually of said Highland Boy mining claim, embracing the ground in conflict, since the location in 1873, and were in such possession at the institution of the suit, and had continually worked and developed said mining claim, expending in labor and money thereon some six or eight thousand dollars.

The 9th finding in substance is that this vein upon which the Highland Boy location is, runs northeast and southwest, substantially conforming with the survey marked on Exhibit G.

The substance of the 10th finding is that the plaintiffs and their predecessors in interest have complied with all the law in that regard, both of the United States and of the mining district.

The 11th finding is devoted to describing the overlap of the two mining claims, and the 12th finds that the title created by the Highland Boy location is in the plaintiffs below. This is a just and fair abstract of the findings below.

It would be useless further to continue, at any great length, the discussion in this brief of the propositions that (1) these findings of fact embody nothing that is objectionable as a legal conclusion, and (2) that they are not repugnant, or (3) that they do sustain the judgment.

For example, take the matter so much urged in the opposing brief, that the court below found a lawful possession to be in the plaintiffs below from the time of their ineffectual location in 1873, until the time of their making a good location in 1874. Much is said about this being an inconsistency and repugnancy, and a fatal error in the court, which is totally without foundation.

The possession from the time of the location in 1874 onward is shown by the facts found to have been based upon a lawful entry, and the fact that the court found that they were in possession from 1873 until 1874, is at most imma-

terial, (though we think not immaterial,) and vitiates nothing in the record.

Or take another example upon which much stress is laid, that the court does not find that anything was public land, at the time of the Highland Boy discovery and location, except at this point of discovery, and this point was not on the disputed ground.

Now regarding these points, we have shown by the authorities cited that where the pleadings admit a fact, the court may base its judgment on the state of the pleadings, and treat as a fact that which the pleadings confess and so treat.

The petition alleges that the claim in this case was one upon lands which were subject to no other claim than the paramount title of the United States. This is a declaration that they were public lands. If objectionable as not being sufficiently direct, the objection was waived. (Richmond Mining Co. *v.* Rose, 114 U. S. 576.)

The answer does not deny and therefore admits this, with the exception that it asserts the priority of right of the defendants below, in such public lands. There was therefore no fact in issue in regard to these being public lands, and the court could rightly base its judgment on the fact. So that if the criticism of the opposing brief were true, that finding 7 finds no more than that the point of discovery of the Highland Boy was on public lands, still the pleadings in the case and the admissions of the answer establish the fact. So also in regard to the position of the opposing brief, that the plaintiffs below, whilst describing their location as one running northeast and southwest, were allowed to deflect from that direction a certain number of degrees whilst the similar privilege was not accorded to the defendants below. The answer to this is, that the court finds distinctly that in 1874 the plaintiffs made their location in every respect conforming to the local mining law and the general mining laws. This was found to have been done

by a location found to be perfect, and to have been one that "was perfected, made good, and marked out on the surface in 1874, a full and proper record thereof being then made." So that here is a finding that explicitly covers the requirements of the statute, so far as location is concerned. That the word "distinctly" was not used before the word "marked" is obviously a criticism not entitled to consideration.

Then the court further finds (finding 8, R., p. 7,) "that the plaintiffs and their predecessors in interest have been continually in the possession of said Highland Boy mining claim, embracing the ground in conflict herein, since the location thereof in 1873, and was in such possession at the institution of this suit, and have continually worked and developed said mining claim, expending in labor and money thereon some six or eight thousand dollars.

These findings of fact by the court show that this location of the Highland Boy claim satisfied every requirement of the mining laws, local and general. The location was one which marked the boundaries of the claim upon the surface just as it is now claimed. It was continuously possessed and worked as now claimed from 1874 onward. No departure from this location is, by the Highland Boy claimants, asked. The public was thus apprised of its boundaries and the policy of the mining laws in that regard satisfied.

The contention of the Omaha claimants is, on the other hand, that because their notice of location (R. 5 and 6) of June 24th, 1870, claimed 2,000 feet of the lode, with its dips, spurs, and angles, commencing at their shaft and running along the lode 1,000 feet in an easterly and 1,000 in a westerly direction, therefore the court erred in not allowing them to follow this lode wherever it went; and in refusing to so find as a fact the position of their location, although, as the court finds, the fact was that they posted their notice of location, claiming 2,100 feet of this

vein or lode running easterly and westerly from this point, and that this claim was not marked on the ground until 1877; and that such location referred to no artificial or surface monument or boundary; that Omaha claimants supposed the vein ran east and west, and so located it, and, after such location and the recording thereof, so claimed it; and made no claim to a contrary course until 1877, and that this vein claimed by the Omaha claimants did not show itself on the surface, and its actual course was not known until 1874, when it was found that it ran northeast and southwest.

Observe that it is nowhere claimed in the case that Omaha claimants ever designated the boundaries of their mining claim by calls for any monument or otherwise,—otherwise than the call in the location notice, for running along the vein or lode. Observe also that their case nowhere questions the accuracy of the fifth finding, (R. 7,) that the vein did not show itself upon the surface and its course was unknown until 1874. These being undisputed facts, the vital complaint made against the court's finding is in its failure to treat the call for the vein contained in the Omaha location notice as a call for a natural monument which would control and fix the direction and position of the side lines and thus satisfy the requirements of the mining laws in that regard. And from this premise it is contended that the court erred in not so finding the facts as to secure the privilege to defendants below to treat their mining claim as a float, and allowing them to depart from the easterly and westerly line called for in the location notice, and from the line on which their actual work was done, in any direction and to any extent to which the said lode might, by future developments, be found to deflect from an easterly and westerly line, so called for in their notice, and by them worked and claimed.

This is the precise character of this alleged error of the court. That this contention cannot be sustained under

the mining law of July 26, 1866, (14 Stats., 251,) nor under any other act or local mining law, is quite plain. We need not enter into details in regard to this contention, because the contention is overthrown by the decision of this court in Mining Co. *v.* Tarbet, (98 U. S., 463.)

That case expounds the acts of 1866 and 1872 in regard to the right of a locator to appropriate a lode outside of the location made by him on the surface in the diagram, etc., required by the act of 1866, and in regard to the requirements in this respect of the act of 1872; and the court holds (p. 467) the design of the two statutes to be the same. Both require a location on the surface. Both contemplate that the surface location shall be lengthwise of the vein, and that the end lines should cross it at right angles, and that no right to follow dips along the side line attaches under either act, unless these side lines correspond substantially with the course of the lode.

The court made the surface location, as made, to control the rights of the locator—made side lines which crossed the vein to be the end lines of such location prohibiting the locator from following the vein outside of a line perpendicular to the side lines so made to be end lines as to the vein crossed. The effect of this decision is to hold—

1. That under both acts a surface location is required.

2. That this surface location must be so indicated and made public as to be ascertainable, and a visible notice to the public, the absence of which will cause "*his rights to subordinated to those who have property located on the lode.*" (P. 468.)

3. That upon and after such location there is left in the locator no right to float his claim, or revolve it, using his point of discovery as a pivot.

4. That the failure of the claim as located on the surface to follow the course of the vein fails to appropriate the vein, and that an expectation to appropriate the vein by the surface location will not entitle the locator to fol-

low the vein or to shift the surface location. The whole case taken together shows just what all mining laws require to make a valid location, namely, a call for or fixing of some sort of permanent or visible monuments. That a call for an invisible lode, the position of which is unknown and undesignated, is not a call for a monument, or at least will be subordinated and confined, as the court expressly declares, as to other locators, to its designated surface markings or location.

This case answers all those parts of the opposing brief and of the assignments of error which relate to the holding of the court, both as to the validity of the Highland Boy location and the invalidity of the alleged location of the Omaha claim as one embracing the ground in controversy.

It also answers all complaints regarding the alleged error in the court's finding that the defendants *claimed* and worked their mining claim, in accordance with their location notice, eastwardly and westwardly, and in regard to the court having given weight to this finding of fact. It is an answer, because this court holds the surface location to be controlling, and that the real position of the vein, as afterwards developed, will not draw to it this surface location. Hence, at most, for appellants' contention, the findings as to how the appellants claimed the location was an immaterial finding, and any error in regard to it cannot be relied upon for a reversal.

The inspection of the findings of fact by the District Court, which we have presented, and which we have gone over, do, in the light of the authorities presented, establish, we submit, the following:

1. That they are proper findings of ultimate facts.

2. That conclusions of law are not blended with them.

3. That in no respect, material or otherwise, are they repugnant.

4. That no material one of them, purporting to be a finding of fact, is mere conclusion of law.

5. That if any repugnance existed which can be reconciled when all are viewed together, this will be done.

6. That the facts found by the court establish that the Omaha mining claim did not, as located, claimed, and worked prior to 1877, embrace the land in dispute, save a small triangle not covered by the judgment.

7. That in 1874 plaintiffs below made a valid location of the land covered by the judgment in their favor, and possessed and worked it as required by law, and up to date of suit.

8. That these facts (with an alleged exception, which we consider below) defeat the appellants' alleged priority, and sustain the judgment.

9. That the appellants' surface location, easterly and westerly, as stated in their notice and claimed and worked, fixes that location, and that it will not be allowed to be deflected in order to follow a vein or lode, the position of which did not appear upon the surface and was unknown until after 1874, to the prejudice of a valid location.

We now wish to consider, however, somewhat more specifically, the errors in conclusion of law assigned on page 5 of the opposing brief, than is done in what we have gone over, and to consider some there assigned which we have not specifically noticed.

The first assignment of errors to the conclusion of law is that it does not appear that plaintiffs below were citizens of the United States.

The reply to this alleged error is that this exception was not taken in the court below specially, as required by the Utah Code, and is therefore not embraced in the general

exception No. 6, (R., 12,) assigning as error that plaintiffs were not entitled to a decree. Had this exception been made in the District Court, the proof of course could readily have been made; hence the wisdom of the rule requiring specific exceptions in the trial court, and of the equivalent rule of this court, to disregard in the reviewing court general exceptions, like this exception No. 6, and requiring exceptions to be specific or special. And it is because that exceptions like the present one are so easily cured in the trial court that they are so often omitted to be made there, and then relied upon for purposes of reversal.

But, besides the fact that this alleged error as to citizenship was not raised below, we submit that it could not be raised on the motion for a new trial, because it was not put in issue by the pleadings; but citizenship was, on the contrary, in legal contemplation admitted by the pleadings. The statutes and regulations thereunder require citizenship to be shown on oath in the filings in the land office before one can there be declared an adverse claimant and an order made staying further proceedings. The petition avers this was done, and the answer and cross bill admit it. If this was not a direct and sufficient averment of citizenship of plaintiff, then answering the petition and going to trial make a waiver of the insufficiency of the averment of citizenship which is contained in the averment that they had been decided to be adverse claimants, and were such.

In principle, we submit this is within the case of Richmond Mining Co. *v.* Rose, 114 U. S. R., 576.

Besides, as the judgment does not conclude the U. S., and citizenship must be established before patent, we doubt whether it is properly an issue in this local and possessory action. (See sec. 910 Revised Statutes.)

The next assignment (Brief, p. 5) is that it does not appear that the lands in dispute were unoccupied public lands, and the contrary appears.

We have already noticed this. The pleadings admit

that they were public lands, and the contrary does not appear, unless the occupation by claimants was an occupation excluding our location. That appellants' occupation was not such we have already shown.

The next assignment is, that it does not appear what the local mining laws were, though it appears there were such laws, and it does not appear what acts these laws required nor what acts were done by plaintiffs satisfying the local and general laws, nor that the acts so required were performed.

The findings do show a compliance with the general laws, as we have above seen. They show that plaintiffs, prior to 1874, discovered the lode; that in 1874 they made a good location and marked out on the surface such location, and made a record thereof; that they and their grantors have been in possession of the claim, so located and marked, ever since 1873; have worked and developed the claim, doing labor and expending money thereon to the amount of six or eight thousand dollars; that the vein runs in substantial conformity with the survey as marked on plaintiffs' exhibit; that they have in all things complied with the laws of the United States and mining district; and that by mesne conveyance they own the claim of original locators.

These facts satisfy the requirements of the law, general and local, unless it be required to find what the local laws are as a fact. This, we submit, is not required.

The plaintiffs in their petition, and the defendants in their answer and cross bill, each aver in substance that they, "within the time required by the laws of said district and the laws of Congress, performed all the required labor on said mine, and from said date continuously held, owned, and possessed and worked said premises in strict accordance with all the mining laws, both local and national." (R., p. 4.) This is the only averment in the answer and

cross bill regarding what the local laws and customs were, and what work was done under defendants' location.

If this is a good averment of a fact, to wit, the fact of having performed all legally required work, then it is because, in contemplation of the law of pleadings, and other laws applicable to such a trial, it is an averment of a fact, and not of a conclusion of law. As a conclusion of law the averment would be worthless, because conclusions of law cannot be pleaded.

Both parties treated the character and existence of the local laws and the extent of work done thereunder as a single fact, a unit. They assumed that when they had averred that they did all the work required by the general and local laws, they averred a fact. So they presented themselves to the court and made up the issue for the court to try. So this matter was distinctly presented to the court as one fact, to wit, that they did the work required by the local laws. The court took them at their word as they had set themselves down in their pleadings, and the court found as to this fact in the only way it was presented to the court to be found. And in the tenth finding of fact the court responded to this averment of the pleadings on the part of the plaintiffs substantially in the very language of the petition and of the answer.

Hence the tenth finding is a good finding of fact, and not a conclusion of law. For the court to go further and set out in its findings of fact what the local laws and mining customs of the Territory were, is not only not required by the pleadings in this case, but is not required by any principle of law, and is forbidden by the practice in such cases.

The last assignment of errors on page 5 of the brief is, to us, quite unintelligible. If it means that the court based it judgment on the finding of a valid location by the plaintiffs made in 1873, then it is simply a false assumption of fact. If it means that the court found in the

seventh finding (R., p. 7,) that in 1873 the plaintiffs and their grantors discovered the vein, and in that year made an ineffectual attempt to locate, and that in 1874 they perfected, made good, and marked out on the surface said location, and made a proper record thereof, and that on this finding and the others the court based its judgment, then this assignment is the same thing we have already as fully considered as we care to. The court bases its judgment, in contemplation of law, upon the entire legal effect of all the facts found, as we have already shown.

We have now, we think, noticed the parts of the assignments of error which controlled the case. We have not gone over in detail the opposing argument and do not deem that requisite. It abounds in singularly severe arraignments of the court below, which we have not noticed. These criticisms of the court counsel have not only made severe, but have decorated them by the introduction of the "crawfish." (P. 9.) We incline to think that the introduction of this "quadruped" into the case will, like other parts of these criticisms, not only be instructive to the court, but will remind it, as bearing on the *accuracy* of these arraignments of the court, of the famous and familiar definition, by the student of this same animal—the definition being—"a crab is a red fish that goes backward;" and which his professor pronounced most admirable, with the exception that "a crab is not a fish, is not red, and don't go backward."

If the court should reach the conclusion that it has before it a record upon which it can render a judgment, then we ask that the judgment may be affirmed; otherwise the appeal will, of course, be dismissed.

S. Shellabarger

J. M. Wilson